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THE
L I F E
OF
WILLIAM LATE EARL OF
M A N S F I E L D.

BY
JOHN HOLLIDAY, OF LINCOLN'S INN, ESQUIRE, F. R. S.
AND BARRISTER AT LAW.

LONDON:

PRINTED FOR P. ELMSLY AND D. BREMNER, T. CADELL, JUNIOR,
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AT OXFORD; AND J. DEIGHTON, AT CAMBRIDGE.

1797.

THE
LIFE
OF
WILLIAM LATE EARL OF
MANSFIELD.

BY
JOHN HOLLIDAY, OF LINCOLN'S INN, ESQUIRE, B. R. S.
AND BARRISTER AT LAW.

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J. G. ALLEN, 30, NORTOLAND STREET, LINCOLN'S INN FIELDS, LONDON;
AT OXFORD, AND J. BARNARD, AT CAMBRIDGE.



LBap. Vanloo Pinx. 1733.

James Bairsto del. et sc. 1797.

The Honorable William Murray.
Etat 28.

Published as the Act directs, June 1st 1797 by T. Elmsley Strand

TO THE RIGHT REVEREND THE

LORD BISHOP OF

W O R C E S T E R.

My LORD,

THE great veneration, with which many Barristers and Students of the honorable Society of Lincoln's Inn, in days of yore, idolized the late Lord Chief Justice Mansfield, may be more easily conceived than adequately expressed.

I beg permission, my Lord, to add, without a breath of adulation, that, to clothe the expressions, the pure effusions of gratitude, with proper language, bearing any affinity to your own elegant style, a style which men of letters will revere as long as classical purity, energetic dialogue, and polished diction, are valuable in the English language, appears a work of insuperable difficulty.

Happy would it have been for an enlightened age, if your Lordship's bodily health had to the present period kept pace with the vigor of your mind — if your other avocations would have permitted, what your inclination would not fail to prompt—the payment of a just tribute to the memory of a zealous patron.

patron, and a sincere friend—an office, which, from a chain of circumstances, devolves on one, who, however ambitious he may be from motives of gratitude, respect, and veneration, feels himself very unequal to the task of bending the bow of *Ulysses*, and of performing so difficult a service.

Conscious, as I am, how dissimilar this plain address to your Lordship must be to modern adulation, too prevalent in Dedications to illustrious Patrons; I am likewise conscious, that my having said so little, on the subject of your Lordship's pre-eminent abilities, is the best recommendation of any apology I can possibly make for embracing this fair occasion of declaring to the world, that I am likewise indebted, greatly indebted to your Lordship, for repeated instances of kind attention; that nothing less than your great delicacy could stifle my most grateful acknowledgements, and compel me briefly to add, that I have the honor to be,

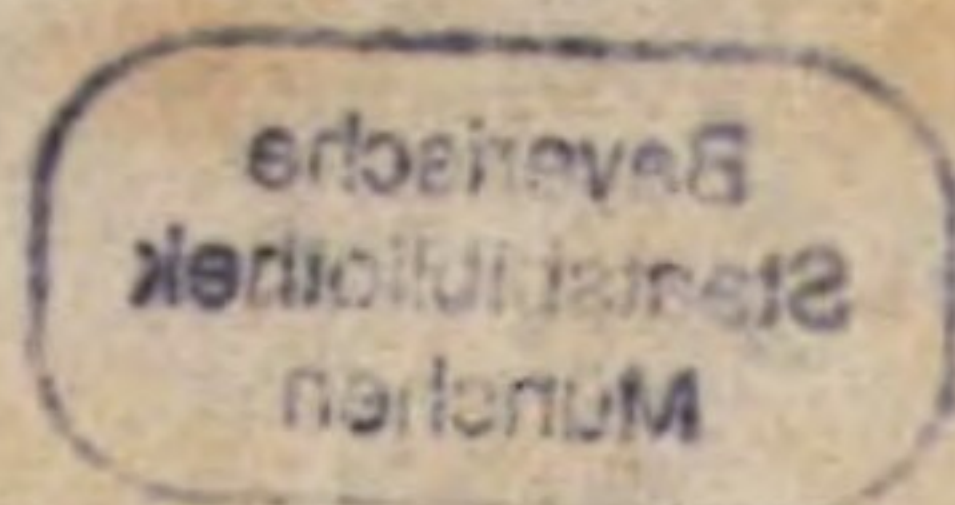
My LORD,

Your Lordship's most obedient

and most obliged humble Servant,

LINCOLN'S INN, *June* 16, 1797.

JOHN HOLLIDAY.



P R E F A C E.

CANDOR will readily confess, that the concurrent testimony of all ages exhibits a warm panegyric on Biography: its leading feature is to captivate and instruct mankind by examples taken from the school of life. When the lives of great and eminent men are faithfully recorded and transmitted down to posterity, they raise a praise-worthy emulation among mankind, to answer the several claims which parents, friends, and country, have upon every candidate for fair fame: hence a laudable ambition prompts every individual to lay the foundation of a reasonable hope, that he may one day either distinguish himself in one of the liberal professions, or may otherwise become an useful member of, and an ornament to, society.

Among antient writers *Tacitus* gives his readers this concise yet just description of the antiquity and real use of biography.

“ To record the lives and characters of illustrious men was the practice of the Roman authors, in the early periods of the republic.”

“ *Clarorum virorum facta, moresque tradere antiquitus usitatum.*”

Julii Agricolaë Vita.

In modern times, that great *sun* of eloquence, lord Chatham, who pervaded and illuminated the British senate with unusual splendor, is thus emphatically described by the discerning *Author* * of *Anecdotes* of some distinguished Persons, chiefly of the present and two preceding centuries.

“ Lord Chatham seems to have been one of those superior spirits who, in mercy to mankind, are permitted occasionally to visit the lower world, to revive or create nations, and to decide the fate of empire.

“ This great luminary once declared in the House of Commons, that no book had ever been perused by him with equal instruction with the *Lives of Plutarch*.”

Any addition to these suffrages would probably, by men of erudition, be considered as a motly groupe of figures in a fine picture, equally unnecessary and improper, a mere waste of time.

Whether we consider the great natural endowments of lord *Mansfield*, the extent of his mental powers, the times of uncommon trial and danger in which he lived, the very long and vigorous life which he employed in the administration of justice : Whether we contemplate his unwearied efforts to render plain and perspicuous, and to improve the laws relating to commerce, to modify and adapt the various rules he had himself established respecting policies of insurance, and to make them from time to time competent to, and commensurate with, the flourishing state of commerce in this country :

These considerations collectively point out a fair subject for useful discussion ; and these considerations, among others which will be brought forward in the course of the work, as occasion may offer, will exhibit the life of the earl of *Mansfield* in the most advantageous point of view.

* William Seward, Esquire, F. R. S.

The author of these sheets has, during four revolving years, been in expectation of some abler pen attempting the delineation of so exalted a character; and he can truly say, that it would have afforded him infinite pleasure to have had a fair opportunity of resigning his materials to any gentleman desirous of signalizing himself in the annals of biography, and of twining round his brow a wreath of no small estimation. He would thereby have enjoyed complete satisfaction, in being able to contribute to the utility, the improvement, and greater perfection of a work of this nature.

So early as in the year 1756 was he captivated and enamoured with the eloquence of Mr. Murray, on his taking leave of the honorable society of Lincoln's Inn. The studious reader is requested to form his own judgement, whether this early admiration of such unrivalled abilities was likely to be effaced, or in any degree diminished, by pleasing and unremitted attention to Mr. Murray's rising fame, and by the unerring testimony of almost forty years experience.

Impelled by a lively sense of gratitude for the signal favor of having been, early in life, patronized by the noble earl, and on many important occasions afterwards countenanced, and treated with great partiality, he is irresistibly prompted, however unequal to the task, to engage in the arduous work, and to pledge himself to the candid reader, that whatever errors may, and too many unavoidably will, creep into a work of this extensive nature, replete with references, none of them shall be intentional.

Some account of the texture of this work and of the materials collected, collated, and presented to the public eye, may, in a prefatory discourse, be acceptable to the reader; for he will be misled, and his time will, in a great degree, be mispent, who expects to find in these sheets the life of the *earl of Mansfield* in his situation of a *statesman*. The writer freely confesses, and has a pride in the confession, that his views are confined to a delineation

tion of the noble earl's character in his *judicial capacity* and in *private life*, in both of which he pre-eminently excelled, since *envy* herself must allow, that fewer weeds were never found on so great an expanse of vigorous cultivation.

The *political life* of this great man will (it is reasonable to indulge the hope) at some future period, be portrayed with greater justice to the character of a dignified statesman, by the learned compilers of the *Biographica Britannica*, than it can be by any private individual, *one* only excepted. Yes, there is one very learned and venerable friend of *lord Mansfield*, "who can speak of his conduct in the House of Lords with the more confidence, because he speaks from his own observation;" and is there a man of science, who will not readily admit that this distinguished prelate stands not in need of any co-adjutor? That he is *ipse agmen*; and that under all the combined and favorable circumstances of gratitude, friendship, affection, and great literary abilities, he could embalm the memory of a deceased friend with aromatics of the choicest sort.

The only hope which an humble individual is ambitious to cherish is, that his account of the life of a great lawyer, may be more useful to the profession of the law, and more acceptable to the public, in proportion to the detail of the *noble earl's eminence in the law*, rather than of his influence in the *state*.

It will in this place probably be expected, that some reason should be assigned for the distribution of the speeches in the following work, into the order of time in which they were delivered.

In this, the great Le Clerc, and the learned Dr. Jortin were his models, who, in the *Life of Erasmus*, have introduced the letters of that wonderful man, in regular succession, so as to give this pleasing proof, that no one year of his studious life was devoted to indolence or inaction. But this is not all! The speeches of lord Mansfield have no connection with, or dependance on, each other; and therefore any reversal of the order of time appeared to be equally unnatural and unnecessary.

But

But in this place, may it not reasonably be asked what favorable and happy opportunities has the writer of these sheets enjoyed, above others, of possessing materials for constructing so great a *work*? However delicate the subject may be, he begs leave to enable the candid reader to form a just judgement of his resources, flowing from several distinct and friendly channels of information.

An original letter, in 1735, introduced in the early part of this work, fell into his hands, as one of the executors of the late *Mr. Booth*, a gentleman of great eminence in his profession, and a contemporary with *Mr. Murray*. In this letter he found the emanations of a friendly heart; and could not reconcile to himself the propriety of classing it, on the one hand, among papers uninteresting to the public, or of keeping it in secret, on the other. In fine, it was restored to *lord Mansfield* at the distance of near half a century, who, after having permitted the company then present to read it, was pleased with great politeness (and possibly with some design) to desire that it might be restored to the same person from whom it came, adding that it could not be in better hands.

The late lord chief Baron *Parker* first communicated to *lord Mansfield* a clause in *Mr. Booth's* will, whereby he left all his Manuscripts to the author of these sheets; when the *lord chief justice* was pleased to say, "he was extremely glad to hear they were in such hands, since few people knew so well as himself the value of these manuscripts."

In addition to the great assistance thus derived from one contemporary of *Mr. Murray*, the author has had the honor of receiving some valuable communications from the learned Sir James Marriot, judge of the court of admiralty, who was in the habits of friendship and great intimacy with *lord Mansfield*.

To Francis Wheeler, Esq. of Whitton near Coventry, who well deserves, and is probably now intitled to the venerable distinction

distinction of Father of the Bar, and who was also contemporary with Mr. Murray; he is also indebted for liberal and friendly communications.

Some interesting anecdotes of lord MANSFIELD have been put into the author's hands by Dr. Turton, in the most friendly manner.

To George Brooks, Esq. banker in Chancery-lane, and late high sheriff of the county of Bedford, the author's grateful thanks are due for the first portrait which was ever drawn of the honorable Mr. Murray, from which the engraving in the Front of this Work has been made.

The debt of gratitude is also very great to William Seward, Esq. F. R. S. who in addition to his permission, to use any of the few yet correct materials which he had previously given to the public, has transmitted some choice observations, of which the author of these sheets is not a little proud.

To Dr. Combe (whose elegant and erudite edition of Horace, inscribed to the earl of Mansfield, has proved that works of literature may flourish under the auspices of a liberal profession) the author's best acknowledgements are justly due.

To have said so little by way of information or advice to the courteous reader, seems to require an apology. The author will endeavour to make the best atonement in his power for the omission.

To those, who, in reading the life of a great man, have only amusement in view, he has no advice to offer, no rules for their recreation to lay down. But to the *Tyros* at the bar, and the *students* looking up to it, he begs permission to recommend, that after a cursory view of the whole, they will respectively be pleased to impose something like a task on themselves, of not only *reading*, but of seriously *studying*, one of the three chapters or divisions of this work, in one or other of the legal

vacations in the year; with a view to discover close analytical reasoning, adorned with an happy facility of expression, clear conceptions, and just conclusions, which will not fail amply to recompence the attention they shall give to the speeches which flowed from the tongue of the *British Tully*. If, by patience and perseverance the great supporters of studious minds, that, which at the first blush may be somewhat irksome and laborious, should wear a more pleasing aspect, and even become a favorite study, the author's labors in their service will not have been in vain: since by emulating the irresistible eloquence of a *Pericles*, they will probably rise above mediocrity, and disdain to creep with *Timæus*.

To apologize for this prefatory discourse, which has imperceptibly swelled to length, which the author little thought of at the opening, would only increase the impropriety of detaining the curious reader in the anti-chamber any longer.

vacations in the year; with a view to discover close analytical reasoning, adorned with an happy facility of expression, clear conceptions, and just conclusions; which will not only supply to the student the attention they shall give to the text, but which showed from the tongue of the Bards Law. It is patience and perseverance the great supporters of studious minds; that, which at the first blush may be termed an idle and frivolous, should even a more serious subject, and even become a learned history. The author's labors in their service will not have been in vain, since by consulting the intelligible eloquence of a Bards Law, they will probably rise above mediocrity, and disdain to creep with

I am obliged to this preface, which has imperceptibly swelled to length, which the author little thought of at the opening, would only increase the impurity of detaining the curious reader in the anti-chamber any longer.

THE
L I F E

OF

WILLIAM EARL OF MANSFIELD.

C H A P. I.

THE Honorable WILLIAM MURRAY, afterwards earl of Mansfield, was a younger son and the *eleventh* child of David viscount Stormont, who was the fifth viscount of the noble and illustrious family of Murray.

Sir William Murray of Tallibard, in the shire of Perth, by Catharine his wife, daughter of Andrew Lord Gray, had four sons; and Sir Andrew Murray, the third son, was the progenitor of viscount Stormont, the father of lord Mansfield.

On the 2d of March, 1705, according to the computation of time in Scotland, but in 1704 according to the legal computation of time in England, William, the fourth son of lord Stormont, was born at *Perth* in North Britain.

About the tender age of three years, he was removed to, and educated in, London; and consequently he had not, when an infant, imbibed any peculiarity of dialect, which could tend to decide that *Perth* had a fairer claim than *Bath* to the honor of

B

his

his birth. The year of his admission, as a king's scholar at Westminster, appears to be 1719.

When he was a Westminster scholar, lady Kinnoul, in one of the vacations, invited him to her home, where, observing him with a pen in his hand, and seemingly thoughtful, she asked him if he was writing his theme, and what in plain English the theme was. The school-boy's smart answer rather surprized her ladyship, "What is that to you!" She replied, "How can you be so rude? I asked you very civilly a plain question; and did not expect from a school-boy such a pert answer." The reply was, "Indeed, my lady, I can only answer once more, What is that to you!" In reality the theme was—*QUID AD TE—pertinet?*

Whether the affinity in Scotch enunciation between *Perth* and *Bath*, or whether the instructions sent with the honorable Mr. Murray for matriculation at Oxford were not written in a fair hand, the mistake of *Bath* for *Perth* was actually made; and, however singular it may appear, candor must allow, that such a mistake might easily happen.

Be that as it may, the entry of his admission as a student of Christ-church, Oxford, of which a correct copy is subjoined, is contrary to the real fact, respecting the place of his birth.

Trin. Term. 1723, June 18.

Æd. Xti. Gul. Murray 18.

David f. Civ. Bath.

C. Som. V. Com. fil.

T. WENMAN, C. A.

Sir William Blackstone is said to have mentioned this curious circumstance to the Lord Chief Justice of the King's Bench, while he had the honor to sit with him in that Court; when lord Mansfield answered, "that possibly the broad pronunciation of the person, who gave in the description, was the origin of the mistake."

Bishop Newton, who was one of his cotemporaries at Westminster, bears this honorable testimony to his school-fellows early fame.

During

During the time of his being at school, he gave early proofs of his uncommon abilities, not so much in his *poetry*, as in his other *exercises*, and particularly in his *declamations*, which were sure tokens and prognostics of that eloquence which grew up to such maturity and perfection at the bar, and in both houses of parliament *.

At the election in May, 1723, when he was in the 19th year of his age, he had the honor of standing first on the list of those gentlemen who were sent to Oxford, and was accordingly entered of Christ's Church on the 18th of June following.

About four years afterwards, he was admitted to the degree of B. A.; and on the death of George the First, the following elegant Latin verses written by Mr. Murray, as one of the members of the University, were *honored with the first prize*; and will probably be convincing to every classical reader, that the great declaimer, or the younger Tully at Westminster, had either courted the Muses with uncommon success at Oxford, or that the learned Prelate has depreciated the worth of Mr. Murray's Latin poetry †.

“ Quo percussisti Britonas conjunctaque regna
 Ictu, Fati ensis! trepidant ipsa atria regum
 Ingentemque stupet mœrens Europa ruinam.
 Georgius occubuit Rheni pacator et Istri:
 Et dubitamus adhuc animam accumulare supremis
 Egregiam donis? quondam decus omne Britannis
 Spargite flore pio cineres, oleæque *Minerva*
 Inventrix, et Phœbe pater, cui laurea curæ!
 Hic Juvenis laurum fovit, longævus olivam:
 Diique deæque omnes! studium queis pace juvare

* See Bishop Newton's Life, page 21.

† Other polished verses by the same elegant pen of Mr. Murray, in praise of *Blenheim*, may be found in that useful repository the European Magazine, for the month of April, 1793.

Mortales, vigiles hic custodite favillam
 Illustrem, famamque viri servate perennem!
 Numine si vestro centum constrinxit aënis
 Bellona[†] horribilem nodis; terræque furenti
 Imposui pacis morem; stetit asper in armis
 Germanus, fremuit jactantior ore minanti
 Hispanus: metuere tamen concurrere bello,
 E latebris tandem excitum tremuere leonem.
 Solvite corda metu; spem si mittatis avaram,
 Fœdera fervetis; vindicta major et ira
 Augusti vobis pietas tutela; triumphum
 Abnuit, Europæ damnis, vitisque suorum
 Staturum: nec vincendi tam dira libido.
 O virtus! O cana fides! quis fundere laudes
 Pro meritis ejus possit, qui dulcia, dictis,
 Non armis, gratæ peperit solatia pacis
 Gentis innumeris: renuens superare jacentem,
 Ipsa tenuerat quem fama nominis hostem?
 Osi patronum viduata valeret ademptum,
 Orphæis urgere modis Rhedycina! sepulchrum
 Attollens insigne lyra, decoraret amati
 Principis illustres manes, gratoque labori
 Incumbens, mœstum sic solaretur amorem.
 Tu tamen interea, quondam spes altera gentis
 Nunc decus et columen, populo plaudente, *Brittanno*
 Succedis Solio ordinibus discordia cessit
 In te diversis, patriæ vox una salutat.
 Hos inter plausus procerum plebisque benigno
 Accipas Rex ore, vovet tibi terga togata,
 Quæ, studiosa cohors operum! pars parva tuorum
 Non ingrata tamen; quoniam nec amantior ipsa
 Est Carolina tui, licet illi pronuba Juno
 Et Venus æterna vinxerunt pectora flamma.

GUL. MURRAY, A. B.

Honoratiff. Vicecom. de Stormont Fil.

Ædis Christi Alumnus."

His

His oration in praise of Demosthenes presented another early presage of his rising fame; a valuable fragment of which, having been preserved, is here subjoined.

*Fragment of an Oration on DEMOSTHENES, by Mr. MURRAY,
when he was a Student of Christ's Church, Oxford.*

Quantum ad veram eloquentiam adipiscendam innumera ea Præcepta quæ Rhetorum libris traduntur, viderint hujus Artis Magistri, quòd exemplis potius quam præceptis ars ea (si qua est) discenda sit nemo certè dubitabit. Quod imitatione magis quam regulis ad benè dicendum formemur hujus instituti ratio docet, quæ optimum in aliquo scribendi genere exemplar ad imitandum proponi jubet. At *eloquentiæ* quem præ Demosthene, sumamus *Magistrum*? Quam orandi legem potius quam nobilissimam ejus pro Ctesiphonte Orationem? Ctesiphontem in judicium vocavit Æschines quia Demostheni immerenti et contra leges coronam decrevisset. Prima pars accusationis legum continet interpretationem satis acutam. Altera Demosthenis vitæ tam privatæ quam publicæ reprehensionem sanè gravem. Eundem ordinem in defensione suâ quivis alius orator observasset, at non Demosthenes. Quâ solemnitatem exordii animos auditorum incitat! Deosque deasque omnes benevolentiae suæ in civitatem testes adhibet! Quam sibi modestâ meritorum in cives suos commemoratione ad se audiendum munivit viam! Dum nihil aliud videtur elaborare quàm ut cum æquo animo judicis audiant, efficit ut prosequantur benevolo. Mentibus omnium ad lenitatem misericordiamque erga se revocatis, de legibus pauca disceptat. Quâ subtilitate Æschinis interpretationem oppugnat et evertit, suam defendit et probat: Quam acuta et enucleata est hæc tota disceptatio, quam pressa! Festinat enim ad res suas pro Republicâ gestas (quod validissimum causæ firmamentum videbatur) orationem convertere, et in uberiori administrationis suæ campo spatari.

Sed alia videamus, et spectaculum sanè Deo dignum, ecce hominem patriæ inimicos suos facientem, inter Græciæ incolumis corruptelas incorruptum, inter fractæ ruinas erectum! Audiamus easdem in dejectâ civitate, de gloriâ, de libertate sententias proferentem et inspirantem quas Republicâ florente Pericles. Audiamus, *ratione* non eventu, *bonestate* non utilitate, consilia perpendentem et eadem in Foro, trutinâ actionis examinantem quæ in Sylvis
Academi

Academi Plato. Audiamus eadem contra Tyrannidem Alexandro *vivo*, fulminantem quā Cæsare *mortuo* Tullius. Nemo rerum frequentia crebrior quam Demosthenes in nullā oratione tanto splendore, divina hæc oratoris vis et anima eloquentiæ enitescit quanto in hac pro Ctesiphonte. De rebus a se gestis eodem animo et ingenio (a quo gestæ erant) magnifice dicit. Non enim lapidibus civitatem stabilitam—præclare dictum, si post Marathonis victoriam dixisset Miltiades, quanto autem sublimius *idem* post Cheroneæ cladem dicere audere, quanto gloriosius *populo applaudente* posse. Tullium aliàs divinum, de se ipso loquentem *summo aurium fastidio* audimus. Demosthenem *nullo*, quia, pro periculo, *non* in gloriam merita sua referre, et nisi laceffit omnino filuisse videtur. Nullibi se *patrem patriæ dicit*, sed ubique *ostendit*, non laudat administrationem suam sed narret, non jactat sed defendit. Veruntamen, constat neminem *melius* unquam laudatum fuisse, quia per singulas orationis partes admirabilem se *efficit*, nec *appellat*.

Est omnino ingrata et invidiosa ad dicendum materies, *sui ipsius* prædicatio, at Demostheni in *hac* causâ præcipuè difficilis, coram populo, enim qui quod malè successit, malè susceptum fuisse plerumque judicat. Gloriam sibi sumit rei gestæ *permagnæ* quidem, sed eventu Reipublicæ *calamitosæ*.

Quâ gravitate de consilii sui ratione differit! Quâm *divino* incremento surgit argumentorum series! Quòd decretum proposuit, cum præco concionari juberet, *officii* sui (quod tale quo nihil melius inveniri potuit), *sapientiæ* docet fuisse. Quòd, virtute assiduitate, consiliis suis successum meruit, benevolo et diligenti civi, debitam coronam sibi vendicat. Quòd *eo caruit* non culpæ *sua*, sed fortunæ dandum esse ostendit. Quâ tamen celsitudine animi (qui nil nisi grande concepit) victis Atheniensibus probat eæ sententiæ parendum, et cum Philippo congrediendum fuisse, licet eventum (quem nemo suspicatus est) planè prævidissent omnes. Nihil unquam *de amore patriæ* mirabilius, nihil *de glorioso periculo, turpi securitati de morte servituti præferendâ*, concipere Brutus et Cato, quam quæ hunc orationis locum illustrent. Exemplo *majorum*, qui pro communi Græciæ salute periclitavêre, sententiam defendit suam laudatione, iudiciis eandem animi *magnitudinem* insinuat, cum (*quasi Deos*) efficit Demosthenes *illos*, qui Themistoclem in *exilium* sequi, quam domi *servire* maluêre. *Non amplius* Cheroneæ infortunium videtur, *patrum* laudibus cohortati et elati extra se rapiuntur *auditores omnes* et eodem animi ardore inflammantur, successum *Deorum* arbitrio tribuunt, quod *patriæ virtutis æmuli* prælium commisêre serîò *triumphant*.

Eæ sententiæ vi suâ non placent tantùm sed *persuadent*, sed languentia populi corda *divino* quodam furore excitant, *verborum splendore* illustratæ, *colleclam* oratoris potentiam explicant.

Demosthenis orationem, *naturalis* ornat non fucatus nitor, ita verbis est aptus, ut ea res ipse peperisse, ita porrò pressus ut *dilucidè* potius quam eloquenter dicere videatur. Diffusior Æschines, sed in *summa ubertate* luxuries inest. Multa sunt *huic* quæ detractes *ambitiosa* ornamenta, illi quod *addas* nihil, aliquanto *dulcior* Isocrates sed cum *satiestate* delectat. Demostheni rerum *magnitudine* occupato, non *vacat esse diserto*; minime vacat de maximis Græciæ *periculis*, post Elatæam captam dicenti, *pigmentis* fucoque puerili sententiam explicare. Quanto tamen *efficacior*, subitæ hujus exhortationis contra Philippum dignitas quam contra Xerxem quindecim annis elaborati sermonis elegantiae. Tam felici facilitate fluit oratio, ut omnino elaborata appareat, tantâ tamen arte *celatur* ars, tantâ curâ struitur hæc jucunda verborum conclusio, ut *versum* quendam numerumque conficiat, cujus syllabas *mensurare* maximi critici non dedignantur. At figurarum copiâ, vi, sublimitate, facile omnes antecellit Demosthenes. Quibus transitionibus puncta argumentorum occulit et velat! *Æstu* quodam ingenii sui procûl abreptus, aliud agere videtur cum in ipsa digressionem quam maximè causa sit. Quâ continuatâ metaphorarum connexionem contra Græciæ *proditores* invehitur! Probationem affert nihil mali fecisse Athenienses, scilicet, *exemplum majorum*; at unâ jurandi figurâ probationem hanc in eximiam *sublimitatem* mutat.

Sunt hæc magna quidem, sed sunt majora.

Quis flexanimam Demosthenis potentiam dignè explicaverit, quæ summisso placidoque principio in animos omnium, velut in *accensos* agros taciturno roris imbre leniter influentes, *incendium* quod reliquerit Æschinis, *extinguit*, populique furorem placat. Mox vehemens et acer vi quâdam incredibili, auditores extra se, contra Æschinem calumniatorem odio, mercenarium Philippi contemptu proditorem patriæ irâ rapit. Nullâ peroratione ad commovendum utitur, nullas animi perturbationes velle concitare videtur Demosthenes, sed sententiis tam novis, tam integris attonitos judices percellit, tam *densis*, velut turbine quodam violento, quocunque velit, præcipitat. Non ad iracundiam contra Æschinem Athenienses hortatur, sed Græciæ Diis iratis fruentem coarguit, non implorat misericordiam suorum civium, sed quæ pro patriâ passus est, vivis coloribus depingit. Sic, omnem artificii suspensionem tollit, et in narrationibus non *advocati* studium sed *testis* fidem, in argumentis, non rei *excusationem*, sed judicis auctoritatem habet. Æschini, quem adver-

sarii

farii crimina laboratis periodis amplificantem, suâ mellifluâ insinuatione extenuantem videmus, plaudimus, et ingenii famam concedimus. Demostheni, qui sub historici personâ oratorem celat, qui felici eâ audaciâ quam veritas sola parit, beneficiorum cives, benevolentiae suæ Deos testes adhibet, credimus et favemus. Cicero, placatis judicum animis quantum ipsi patiuntur accepit, tanta tamen ejus facundia, ut quidvis impetrare posse videatur. Non *petit* Demosthenes sed *rapit*, sed impetu quodam penè divino, sententias de eorum manibus *extorquet*. Dulci Ciceronis arte veluti, Sirenum cantu, delectati judices cum illo malunt errare, quam cum aliis rectè sentire. Demostheni tanta auctoritas inest, ut *pudent* dissentire, et cum fulmine eloquentiæ *transversè* feruntur auditores, non oratoris arte abripi, sed naturam sequi, sed rectæ rationi se parere credunt. Cum orationes suas contra Clodium aut Catilinam figuris auget, elocutione Tullius exornat, circumstantis populi clamoribus etiam admiratione excipitur. Cum Demosthenes contra Æschinem iis affectibus, qui ab *ipsâ naturâ* oriuntur, suam animat iracundiam, dicentis obliviscuntur Athenienses, et (ut historiæ proditum est) *eodem furore omnes inflammati mercenarium Æschinem appellant*.

In aliis orationibus gravis, in aliis subtilis, in hâc omnigenæ penè eloquentiâ leges exhibet Demosthenes, quippe digna causa, dignus adversarius, digna totius Græciæ expectatio, ut summas oratoris vires, et se *ipsum superare* laboraret. In hâc unâ, plura quam in aliis omnibus, sublimitatis exempla reperit Longinus. Hanc velut *optimum* Atticæ eloquentiæ exemplar, Latino sermone, Tullius edidit.

The rest of this exquisite Oration is wanting; and who shall attempt to supply its deficiency? The statue that Praxiteles left imperfect, what Grecian artist dared to finish?

Lord Monboddo, in his excellent Treatise of the Origin and Progress of Language, has paid so just a tribute of respect to this fragment of his friend and patron's juvenile declamation, as to make it the subject of an entire chapter, wherewith the sixth volume concludes, with a beautiful apostrophe or address from the author in his 77th year to lord Mansfield, then on the verge of 89. A summary account only, confined to the subject of the declamation, will be presented to the reader.

Mr.

“ Mr. Murray, before he left Oxford, made an oration upon the subject of Demosthenes’ speech *De Corona*, (the finest of all his speeches in the judgement of the Halicarnassian,) in very elegant Latin, where he has shewn, in a most masterly way, the great talents of an orator exhibited by Demosthenes in that speech. A great part of the manuscript (for it is not printed, which I think it should have been) was consumed in the fire which burnt lord Mansfield’s house in London some years ago. With a copy of what remains of it, I was favoured by lord Stormont, whose love and knowledge of Greek learning I have taken occasion elsewhere to mention. There is one which he has observed and dwelt upon a good deal, as it is what distinguishes Demosthenes more, perhaps, than any thing else from every other orator; and that is, his insisting so much upon the topic of the *pulchrum* and *honestum*, the beautiful and praiseworthy, in sentiments and actions. There is a good deal of this in almost all his public orations, but particularly in the one at present under our consideration, that *De Corona*. It is the noblest topic of oratory, being the noblest passion of the human mind, and furnishes arguments more persuasive to a great-minded man, than any that can be brought from what is pleasant, profitable, or even safe. He has carried this so far as to say, “ that if they had all known what was to happen, and you, Æschines, instead of being silent as you then were, had foretold every thing that happened, yet the Athenians ought to have done what they did, if they had any regard to their own reputation, to the fame of their ancestors, and to the testimony of posterity.” So strong an assertion as this needed some preface, and preparation of the minds of the people for it; and accordingly he conjures them, in the name of the gods, not to be surprised at the paradox he was to advance, but to hear him with patience and good-will. And he carries it so far, as to affirm upon oath, that they did not err when they followed his counsel, though with such ill success, swearing that famous oath, which the ancient critics celebrate so

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much,

much, "by the manes of those, who perished at Marathon, Salamis, and Plataeæ, defending the liberties of Greece."

Who can read this, without admiring not only the orator, but the people who had suffered so much by his counsel, and yet could hear him speak thus, not only with indulgence, but even with applause?

Another observation of Mr. Murray is, that Demosthenes has introduced into this oration with great propriety, not only the praise of his own conduct in public affairs, but also the praise of the Athenians, and in such a way as not to appear to be mere flattery, but belonging to the cause.

Another excellent observation of Mr. Murray as to the matter of this oration is, that Demosthenes, under the historian, conceals the orator. The style is as excellent as the matter, being most chaste and correct, having nothing wanting in it, nor any thing superfluous or redundant. He excelled, more than any orator ever did, in the greatest art of a speaker or writer, the concealing of art. And, therefore, though he laboured his words very much, the weight of his matter and the force of his arguments were such, that he seemed, to the generality of his hearers or readers, to be so much taken up with the great affairs, which were the subject of his orations, that he gave no attention at all to the words, farther than to convey his meaning; but the learned critic will perceive a wonderful art in the order and arrangement of those words, by which, not only the ear is much pleased, but the sense more forcibly conveyed than it could otherwise have been, as I think I have elsewhere shewn. His excellence in composition, his rival Æschines acknowledged; but so artificial a composition must have been very well pronounced, otherwise it would have been hardly intelligible; for, it abounds with parentheses, some of them very long, and with parentheses within parentheses, as the Halicarnassian has observed. Now a parenthesis, properly introduced and well pronounced, I hold to be one of the greatest beauties of style, and particularly of what

is written to be spoken ; for it not only gives a density and compactness to the matter, but, by being detached from the rest of the sentence, it draws the attention of the hearers the more. It should therefore contain something worthy of that attention ; and if it be also pronounced with a proper variation of the voice, suitable to the subject-matter, will give great force and weight to the meaning of the whole sentence. Upon this, so perfect model of eloquence, lord Mansfield formed a chaste and correct style of speaking, suitable to business, and particularly the business of a judge, to whose office it belongs, not only to determine controversies betwixt man and man, but to satisfy the parties that they have got justice, and thereby give ease and contentment to their minds, which I hold to be one of the great uses of law. In this lord Mansfield, as it is well known, was so successful, that even the losing party commonly acknowledged the justice of his decrees."

The beautiful apostrophe of Lord Monboddo commenced here ; but, inasmuch as it is a kind of Cicero de Senectute, there seems to be more propriety in transferring it to (and the reader will probably have more pleasure in finding it in) the last chapter of the present work.

In April, 1724, Mr. MURRAY was admitted a student of Lincoln's Inn.

On the 24th of June, 1730, he took the degree of M. A. and left the University soon afterwards, full of vigor, and determined to travel into foreign parts, before he sat down to the serious prosecution of his legal studies, to which his genius and his slender fortune, as a younger son, forcibly and happily prompted him. He travelled through France, and in Italy, at an age fitted for improvement and useful observation ; not between 19 and 21, a period which his great patron lord Hardwicke, in one of the numbers in the Spectator, under the modest signature of *Philip Homebred*, evinces to be too early an age for our British youths to travel to any real advantage. At Rome Mr. Murray was probably inspired, and animated with

the love of *Ciceronian eloquence*; at *Rome* he was prompted to make Cicero his great example, and his theme! At *Tusculum*, and in his perambulations over classical ground, why might he not be emulous to lay the foundation of that noble superstructure of bright fame, which he soon raised after he became a member of Lincoln's Inn?

Whether, in point of time, the two following letters were written by Mr. Murray while he was abroad, or soon after his return to his native country, is very immaterial to the cause of literature; but it is a very material and pleasing circumstance to his biographer, that these letters, intended for the use of a young nobleman, must have been written about the year 1730, when Mr. Murray was a very young man, inasmuch as the fact can easily be ascertained, that the young duke of Portland spent three years in his travels in France and Italy, and returned to England in 1733.

To establish the reputation of Mr. Murray as a scholar, previous to the discussion of his career in pursuit of fame at the bar, the LETTER upon ancient history, and a short plan for a course of reading it, by lord Mansfield, are subjoined.

“By the short plan I am going to propose to you as a course of real study for about four months, with assistance, allowing for interruptions and avocations, I mean, in the easiest and most delightful manner, to introduce you to a slight acquaintance with some of the most shining parts of ancient history, policy, and eloquence, which, if once fixed in your mind and memory, will be serviceable to you as long as you live, and help to give, or at least improve in you, the two great accomplishments which, your friend Horace says, your nurse wished you to attain, *sapere & fari*.

In the wide field of ancient history, I have skipped over the rugged places, because I meant to lead you on carpet-ground; I have passed over the unprofitable, because I would not give you the trouble of one step which does not go directly to useful knowledge, and useful to *you*. My plan means to carry you but to some of the profitable parts, because I am afraid of fatiguing you with a long journey at first. I do not propose to you to read any history at large, because, for the present, I want to draw you on the shortest and

and nearest road. I chuse for your guide, as near as I can, Sir Walter Raleigh, who was a wit, a statesman, a courtier, a soldier, and a scholar; to tinge you betimes with the ideas natural to such a character; for, a river does not more certainly take its colour from the different soils through which it runs, than the matter does from the cast of mind, profession, and manners, of him who treats it.

Without plaguing you with Greek, I give you *from* Demosthenes a specimen of that true and manly eloquence fit for a senator, magistrate, and statesman, in public assemblies, which consists of strong sense methodically digested and plainly expressed; not in laboured periods, antitheses, flowers, &c. &c. with which all false eloquence, Greek, Roman, and Latin, abounds, and which, from the beginning, has generally been laughed at, and mistaken for the true.

I have a view to your keeping up, and improving, your knowledge of Latin; for the rest, I consider only your attaining the perfection of your own language, and laying in materials of eternal sense for thought and action.

This plan will be a trial whether you have genius and resolution enough to persevere in a course of study for four months.

An interruption of any length between this and another course there is no objection to; but, if you break the thread of this, the whole utility will be lost.

An easier cannot be suggested; the subject is interesting; your helps are great.

Victor Olympiacæ retulit qui præmia palmæ.

You know the rest, and feel the application.

My plan is as follows:

Read *Du Choix et de la Conduite des Etudes*, par l'Abbé Fleury, f. 26, *histoire*; f. 31, *rhétorique*.

Read and translate into your book *Tull. de Oratore*, lib. II. f. 51. *Age vero, inquit Antonius, &c. to f. 63. de cujusque vitâ atque naturâ.*

Let L.* be master beforehand of the apt construction of this and every other book I desire to be read and translated.

Tull. de Legibus, b. I. f. 2. *Postulatus à te jamdiu to f. 3. curâ vacare et negotio.*

* The tutor to the duke of Portland.

Tull. de Offic. Sed cum plerique arbitrantur, l. i. f. 105. to turpitudinique anteponenda.

Let L. give you a general account of these books of Tully.

In the history of the world, four empires have successively risen and fallen, and have given way to a fifth system of policy and power, which continues to this day: 1. Assyrian; 2. Persian; 3. Grecian; 4. Roman; 5. Goths, Vandals, &c. who, upon the destruction of the Roman empire, overspread our world.

The four first are the subject of this plan, the fifth I reserve for another.

Let L. explain to you, in a few words, the duration and extent of these empires. There is a *French Chart* which explains it to you mechanically.

Let L. tell you who Sir Walter Raleigh was, his story, fate, and the circumstances under which he wrote his history. Then read, for the origin of society, Sir *W. Raleigh**, b. i. c. ix. f. 1, 3, 4.

Read, and translate into your book, which I suppose you to use for your remarks in this course, *Tull. de Offic. l. ii. from Mibi quidem to arbitrantur.*

I pass over all the Assyrian empire, applying *Vixere fortes ante Agamemnona*, &c. b. ii. c. ii. f. 3.

Let L. explain who *Xenophon* was, his story, time, reputation as a philosopher, historian, general, and author, and his famous retreat; b. iii. c. iii. f. 3, 4, 5, 6. c. v. f. 6, 7, 8. c. vi. throughout. You now come to events and characters celebrated by poets, historians, orators, &c. &c. and which it is a shame not to know; c. vii. every section except the 7th, c. viii. and c. ix. throughout.

Let L. inform you how the Peloponnesian war is memorable by having its history written by Thucydides. Let him turn you to the *English Translation of Thucydides*, which, though very stiff and very bad, gives the sense, which you may vary into better words. Let him shew you the *Speeches*, such as the *Funeral Oration made by Pericles*; likewise some of the most shining passages, which, mending the English, transcribe into your book. B. iii. c. xii. throughout.

* These references are to Sir W. Raleigh's History of the World, first printed 1614, with his life by Oldys, 1736, 2 vol. fol.

His trial 17 Nov. 1603, 1 Jac. I. executed Oct. 29, 1618, ætat. 66. Popham, chief justice, with the commissioners, Sir E. Cook, attorney general.

Read carefully *The English Translation of Mons. Turreil's Historical Preface to Demosthenes*, printed at London the beginning of this Century, b. IV. c. I. f. 2 to f. 8. inclusive.

Read over and over such of the *Speeches of Demosthenes as are translated into English by Earl Stanhope, Lord Lansdowne, &c. &c.* and printed the beginning of this century with *Turreil's Historical Preface* beforementioned. Write observations into your book. Get places that strike your imagination by heart. Reflect upon the nature of the Greek states, something like those of the Netherlands and Swiss.

Let L. make himself master of *Turreil's Notes*, &c. &c. so as to be able off-hand to explain terms, allusions, and facts referred to b. IV. c. II. throughout.

Here take for granted, that Alexander's captains divided the succession, fought about the division, in the course of generations destroyed one another, erected several states and kingdoms, which were all at last swallowed up by the Romans. Roman History, b. II. c. XXIV. throughout; b. IV. c. VII. f. 1, 2, 3. b. V. c. I. f. 2, 3, 8. Recollect the story of Regulus, celebrated by classic writers, the ode of Horace, &c. Tull. de Off. b. III. p. 134. Translate f. 9, 10, 11. c. II. f. 8. c. III. throughout.

Take for granted, that after the second Punic War the Romans found or sought occasions by which they conquered the whole Grecian empire; they learned letters and arts from Greece, grew polite and scholars.

Græcia capta ferum victorem cepit, &c.

Serus enim Graiis admovit acumina chartis,

Et post Punica bella quietus, &c.

c. VI. f. 12. End Sir W. Raleigh.

Vertot's Roman Revolutions, b. X. XI. XII. XIII. XIV. throughout. Reflect on the nature and constitution of the Roman republic. Whether it was not founded for one town, or at most a little republic, not bigger than that of Florence, but inconsistent with a large state. Whether it did not continue so long by accident, by personal characters in early times, and by foreign occupations, more than the nature of the constitution, which turned at last into anarchy. Read *Bellum Jugurthinum* by Sallust, beginning after the Introduction with *Bellum scripturus sum*, &c. It is not 100 short pages. *Sallust's Characters of Catiline, Cæsar, and Cato, the Speeches by Cæsar and Cato.*

Cicero's

Cicero's four Catiline Orations. Study these; write observations in your book.

De la Grandeur des Romains, et de leur Décadence, c. XI. *Cicero's fourteen Speeches against M. Antony*, which, in imitation of Demosthenes, are called Philippics. Write observations, &c. &c. into your book. The second, which is the finest, and cost him his life, is the only speech of length.

When you have finished the above course in the manner proposed, go over the whole a second time, which, if you make yourself master of the first time, need not cost you many days.

The next thing in order is, that you should have some notion of the history of the Roman empire from Julius Cæsar to the end of the fifth century; but I am at a loss to direct you how to get an intelligible idea in so short time as my plan would at present allow to that subject. The *History of the Twelve Cæsars* by Suetonius is well written, but the advantage to you from reading him would not be equal to the time it must take. That part which Tacitus has written is admirable, and may one day well deserve your attention; but you will understand him better hereafter, and I am in haste to carry you through a general plan of modern history. When you have once laid your foundation in general knowledge you may afterwards follow your genius and inclination in applying to particular parts and particular authors. I have upon this occasion read Eutropius; but I am afraid he is too concise to give you any idea. He gives little more than a muster-roll of the names of the emperors. Reading in that manner, I doubt, will be to the memory like the way of a ship in the sea.

The best proposal I can make is, that L. should take c. XII. to XVIII. inclusive, *De la Grandeur des Romains, et de leur Décadence*, adding the Chronology, and throwing upon paper enlargements upon particular parts, especially the grand epochs; as for instance, let him throw, upon paper, strokes of the character of Tiberius, and some remarkable parts of his reign, which he may easily take from Tacitus. The same as to Nero, &c. &c. Let him dwell a little at large upon Trajan, Marcus Antoninus, the five excellent princes who succeeded the twelve Cæsars, the investing more than one with the imperial authority at once, the removal to Constantinople, *the Code of Laws* by Justinian, military check by Belisarius, *Code of Laws* by Dioclesian, the division of the empire into two, and the general idea and consequences of that division. Let him point out famous writers in each reign. This will give some trouble, not a great deal. After this read the *Bishop of Meaux's* [Bossuet's] *Dif-*

Discourse on Universal History, Tit. de l'Empire Romain, to the end. This will give you a small map, sufficient at present. Reflect on Roman imperial government—military and tyrannical, like the Turk and the Russian.

I propose, for my second plan, the fifth system of policy and power, and to lead you through the most useful and interesting parts of modern history; but the sketching such a plan will give me a good deal of trouble. Short explanations, not to be got from books; observations by way of key to transactions of ages; hints, from whence characters, contrasts by comparison of men, times, works, and systems, &c. &c. may be serviceable, and must require time. You will therefore excuse my not thinking of it, until I see, by this trial, whether you have genius and resolution enough to go through what is necessary to raise you above the common level;

Victorque virum volitare per ora."

LETTER upon Modern History by Lord MANSFIELD, for the Use of the Duke of PORTLAND.

"The best and most profitable manner of studying Modern History appears to me to be this: First, to take a succinct view of the whole, and get a general idea of the several states of Europe, with their rise, progress, principal revolutions, connections, and interests; and, when you have once got this general knowledge, then to descend to particulars, and study the periods which most deserve closer examination. The best way of getting this general knowledge is by reading the history of one or two of the principal states of Europe; and taking that of the less states occasionally as you go along, so far as it happens to be connected with the history of those leading powers which you will naturally make your principal object, and consider the other as only *accessoriæ*.

Though the history of England is certainly that which you will study most, yet I think you would do well at present to give the preference to that of France; and therefore the short plan which I shall endeavour to sketch for you shall be chiefly with a view to the history of that country.

The reigns of the first race of French kings are so little known, and so little worth knowing, that I think it scarce worth your while to read them even in the shortest abridgement.

L. will be able to tell you, in half an hour's conversation, as much about them as ever you will want to know.

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As to all those disputes about the foundation of the French monarchy, upon which volumes have been written, as whether Clovis was a great prince or a *chef d'avanturiers*; whether he owed the crown to force of arms, or the consent of the people, or to both, &c. &c. they may do to employ the leisure of idle speculative men, but can never deserve the attention of a man who intends for active life, and feels the value of time.

The victories and conquests of Charlemagne, his great power, and immense extent of empire, are too striking objects to be entirely overlooked. I think it would be proper for you to begin with the reign of *Pepin, the founder of the second race of French kings*. For *that race, and for the third, as far as Lewis XI.* it will perhaps be sufficient to read, carefully and slowly, for there is no other way of reading to advantage a book where so much matter is crowded into so small a compass, *Henault's Chronological Abridgement*, which is a capital book of the kind. When you meet there with any remarkable event which you would wish to know more particularly, such as the battle of Cressy, Poitiers, and Agincourt, you may turn to *Mezerai* or *Rapin*; and I would advise you, when you have read in *Henault* the reign of any king, to read his character in *Mezerai*; for, though nothing is less to be depended upon than such ideal characters, yet they are not entirely without their use; they are at least helps to the memory, and leave upon the mind pretty much the same sort of impression that is made by seeing the pictures of eminent men; when we have examined any such picture, no matter whether like or not, we grow, as it were, better acquainted with the original, and form to ourselves an idea of his person, which helps to fix in our memory whatever we hear or read about him.

This superficial knowledge of the history of France is as much as you will want till you come to the reign of Lewis XI. when that history comes to be really interesting, and consequently must be read more at large, and with much greater attention. I should be tempted to doubt whether the common method of abridging history as you read it has all the advantages that is generally imagined. If you enter into a detail, the work is endless; and, if you content yourself with short, dry epitomes, they are, if I may judge by my own experience, of little or no use, scarce any help to the memory, and forgot almost as soon as made.

What I should recommend as a much more useful exercise is, to set down, in a few words, the most striking and interesting events, with such observations upon them as occurred to you at the time. To explain what I mean

by an example : I would observe, in the reign of Lewis the XIth, the advantages with which he came to the crown ; the manner in which he improved those advantages, by fomenting divisions in England, by corrupting the English government, and even the king himself ; the foundations he laid for the future greatness of France, by adding to his kingdom such rich and powerful provinces, and by lowering and humbling the nobles (who before his time were so many petty tyrants), and by that means giving a solidity and consistency to the French government, which it never had before. I would likewise remark the inconsistency of his character, the strange blunders he committed, such as putting himself into the hands of the duke of Burgundy, and that too at the very time he was betraying him ; his missing the opportunity of marrying his son to the dutchess of Burgundy, and adding to France, without the least expence or bloodshed, those provinces which, by his neglect, fell into the hand of her rival, and have been ever since the object of her ambition, and the cause of so many ruinous wars : these are far from being all the memorable events in this reign ; many I have forgot, and some that occur to me I purposely pass over, that I may leave them for your observation. What I have said is sufficient to explain my idea, and give you a hint which you will easily improve.

The *Memoirs of Philip de Commynes*, who was Lewis the XIth's contemporary and favourite, deserve to be read with attention some time or other, but I think you should not meddle with them now : the style and language is so different from the present, that it would only puzzle and confound ; besides you will find all the material facts in *Duclos's History of Lewis the XIth*, which is certainly the work of a man of parts, and is written with purity, though there is a stiffness and affectation in the style.

As I imagine you will neither have leisure nor inclination to drudge through the early part of modern history again, I think you would do well to stop a moment, in order to run over in your mind the most remarkable events in that period, and fix them in your memory once for all : what those events are, you are now better able to judge for yourself than I am to tell you ; such of them as relate more immediately to the History of England (and many such there are) you need not so much attend to at present, as you will certainly, some time or other, make them the subject of a particular enquiry ; but there are two great objects, in which the general history of Europe is concerned, which, from their importance and singularity, must have struck you, and will deserve a more particular examination, as they

certainly make the most interesting part of the history you have just been reading; the two objects I mean are, the rise and progress of the Papal Power, and the Crusades, or holy wars.

The origin and growth of the pope's temporal power, the continued series of fraud and artifice on which it was built, and by which it was maintained and gradually improved, is no where, that I know of, more clearly and fully stated than in *Gionnone's History of Naples*; but that is a book which cannot enter into your present plan, but will deserve to be read, some time or other, with the utmost care, as one of the most masterly and instructive books any country ever produced. *That part of lord Bolingbroke's fourth essay*, in which he treats this subject, contains, I think, as much as you will want to know of it at present, f. 31 to 34, f. 35 to 38, and will give you a pretty general idea; though it should be read with that caution with which whoever desires not to be misled will always read the works of a man who wrote with a strong bias on his mind, and had too much accustomed himself to the language of passion.

The holy wars are such a continued series of superstition and madness as is not to be paralleled in history, and as cannot but appear astonishing even to those who see farthest into, and make the greatest allowance for, the weakness and folly of mankind: if, during the time of this epidemical madness, there ever had been any prince wise and great enough to preserve himself from the contagion, and to take advantage of the folly of his neighbours, he might have made such conquests as would have enabled him to give law to the rest of Europe; but not one man in ten thousand is able to rise above the level of the age he lives in. All the princes in Europe caught the infection, and strove only to outdo each other in all the extravagance of enthusiasm. There are several particular histories of the holy wars; but the short sketch in VOLTAIRE is sufficient for your present purpose.

As a taste for letters naturally gives a curiosity to know the history of them, the rise and progress of literature will of course be one of the favourite objects of your attention, and will well deserve to be so; for there is no history more interesting, nor more instructive, than that of *L'Esprit Humain*.

You will have observed that Charlemagne, though illiterate himself, endeavoured to spread learning in Europe; and with that view ordered the best Arabic books to be translated: but the confusion that arose after his death

death soon ended the little he had been able to do for the encouragement of letters, and plunged the western part of Europe into the darkest ignorance, which lasted, almost without interruption, till the reign of Charles the Vth of France, whose reign may be reckoned the first dawn of letters. He was the founder of the famous royal library at Paris; and the French reckon a continued series of poets, from his time to the present, though, till the reign of Lewis the XIVth, there was not one that deserved that name.

The true restorers of arts and literature were the Italians (particularly the Florentines) in the 14th century: the Greeks who, when driven from Constantinople by Mahomet II. took refuge in Italy, were not (as is commonly imagined) the first authors of this restoration, though they contributed greatly towards it, by teaching the Italians Greek, and opening to them, by that means, the truest and purest sources of all taste and knowledge. This you will see explained in *Voltaire's Dissertation upon the Arts and Manners of the 13th and 14th Centuries*, VOL. II. C. LXIX. of his Works. It deserves to be read, though he has treated his subject superficially, and not made it what it ought to have been made in such hands.

You are now come to that period where modern history begins to be really interesting, and where, consequently, it will deserve much greater attention. This period is divided by *lord Bolingbroke* into three particular periods; 1. from about the middle of the 15th century to the end of the 16th; 2. from thence to the Pyrenæan treaty; and 3. from thence to the present time.

The first of these periods, which is the only one I shall consider at present, abounds with such variety of great and astonishing objects, that no eye is strong enough to take a distinct and accurate survey of them at once: a man finds his attention so divided among this multiplicity of objects, that he scarce knows how to fix it; and these objects present themselves under so many different aspects, and may be viewed in so many different lights, that he is at a loss which to choose: new ideas flow upon him so fast, that he is hardly able to separate and range them in order enough to take that general view of them which is all you wish to do at present. To know modern history thoroughly, a man must make it the study of his life; indeed, it is a science of so vast an extent, that I should much doubt, whether a thorough knowledge is within the reach of the greatest abilities and most indefatigable application.

It is of great advantage in all branches of learning, but particularly in one
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of so extensive and intricate a nature, to have a proper clue to your studies; and you cannot, I think, find a better than that which *lord Bolingbroke* has given in his *sixth letter* on the study of history.

I certainly shall not think of meddling with a subject he has treated so ably; but shall only endeavour to supply what he has purposely omitted, and point out to you, as far as I am able, the books where you are most likely to find what he directs you to look for.

The history of Germany is so interwoven with, and makes so considerable a part of, that of Europe, that it is absolutely necessary to have a general idea of the constitution of the Empire. The best short books, that I know of, upon this subject, are, a French essay, called, *Description du Gouvernement présent du Corps Germanique*, printed in 1741; and *Maslow's Jus publicum*; but, perhaps, *Campbell's Chapter*, read with attention, will be enough for your present purpose. If hereafter you wish to know more of the history and constitution of it, you must make it the object of particular enquiry.

You will find in *VOLTAIRE*, in the *Chapters I have crossed in the Table des Chapitres*, a succinct account of the three great events that particularly distinguish the end of the 15th, and the beginning of the 16th, century, viz. the discoveries made by the Portuguese, those still more important ones made by Columbus, and the Reformation: these are some of those great and complicated objects I alluded to above. It is scarce possible to view them in all their lights, and trace them in all their causes and consequences; but all you need think of at present is to fix a general idea of them in your memory, and lay them up there as an inexhaustible fund for future reflection.

The League of Cambray is so interesting an event, that you will do well to read *Du Bos's famous history of it*; and, for a short account of the rise and growth of the republic of Holland, read *Voltaire's* 135 c. and the *first Chapter of Sir William Temple*.

Though the history of the civil wars of France is admirably written by *Thuanus* and *Davila*, you may, I think, at present content yourself with *Mezerai* and *Henault*, adding to them *Sully's Memoirs*, and *Perefixe's Life of Henry the Fourth*; which two books you will read with infinite pleasure, as they give the best idea that is any where to be found of the true character of Henry the IVth, which, with all its blemishes, is certainly one of the most striking and amiable characters to be met with in history.

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At the same time that you admire Sully's fidelity, and the unshaken steadiness and resolution with which he struggled against and checked the scandalous abuses that had crept into the administration of the finances, you will observe that the same austerity of manners, and stiffness in opinion, betrayed him into false and narrow notions about government, and particularly about trade and manufactures; and Henry IV. had much larger views, and in general judged better than his minister whenever his passions were not concerned.

Chapters crossed in Voltaire and referred to in the preceding letter.

- C. 106. De Leon X. et de l'Eglise.
- 7 & 8. De Luther et de Zuingle.
- 9. Progrès de Lutheranisme, en Suede, en Dannemarc, et en Allemagne.
- 12. De Geneve et de Calvin.
- 14. De Henri VIII. et de la Révolution de la Religion en Angleterre.
- 14. Suite de la Religion en Angleterre.
- 15. De la Religion en Ecoffe.
- 16. De la Religion en France sous François I.
- 19. Des Découvertes des Portugais.
- 20. De Japon.
- 22. De Columbo, et de l'Amérique.
- 23. De Ferdinand Cortez.
- 24. De la Conquête de Perou.
- 25. Du premier Voyage autour du Monde."

The Author of these sheets is sorry, that he cannot vouch for the correctness of the numerous references to antient and modern authors in these letters. He can only present them to the public in as perfect a state as he had the honor of receiving them from an ingenious friend, and with all the emendations which the Rev. Mr. Harper, who superintends the extensive and invaluable collection of printed books in the British Museum, has, with his accustomed politeness, promptitude, and liberality, been enabled to make.

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To give a new cast to Mr. Murray's extent of thought, and to evince, that, however pleasing and bewitching the flowery fields of literature were to his well-stored mind, he wisely determined not to be bewildered therein, and early discovered a great veneration for the advice of Horace,

Omne tulit punctum qui miscuit utile dulci.

He was called to the bar in Michaelmas term, 1730. In his career in the pursuit of legal knowledge his assiduity soon cooperated with his shining abilities. Two supporters like these, in perfect unison, not only exempted him from all pecuniary embarrassments, which slender fortune in some, and juvenile indiscretion in others, too frequently occasion, but also conciliated the esteem, the friendship, and patronage, of the great oracles of the law, who adorned that period, amongst whom lord *Talbot* and lord chancellor *Hardwicke* were looked up to as the foster-fathers of the science.

Instead of submitting to the usual drudgery, as some are pleased to deem it, of labouring in the chambers of a special pleader, Mr. Murray's motto seems to have been "*Aut Cicero aut nullus.*"

Early in his legal career he studied the graces of elocution under one of the greatest masters of the age wherein he lived.

Doctor Johnson, in his life of Pope, says, "his voice when he was young was so pleasing, that Pope was called in fondness the *little nightingale.*" Under this melodious and great master Mr. Murray practised *elocution*, and may truly be said to have brought the modulation of an harmonious voice to the highest degree of perfection.

One day he was surprized by a gentleman of Lincoln's Inn, who could take the liberty of entering his rooms without the ceremonious introduction of a servant, in the singular act of practising the graces of a speaker at a glass, while *Pope* sat by in the character of a friendly preceptor. Mr. Murray on this occasion

casion paid him the handsome compliment of, *Tu es mihi Mæcenas!*

The great benefit resulting from an early friendship between Murray and Pope, was, that the young and graceful jurispudent could not be more sedulous to acquire *éclat* in his profession than the poet was to proclaim in bewitching verse the reputation of his friend.

Bishop Warburton, in his annotations on Pope's imitation of the Sixth Epistle of the First Book of Horace, addressed to Mr. Murray, elegantly defines the friendship subsisting between them in a single sentence: "Mr. Pope had all the warmth of affection for this great lawyer, and indeed no man ever more deserved to have a poet for his friend; in the obtaining of which, as neither vanity, party, nor fear, had a share, so he supported his title to it by all the offices of a generous and true friendship."

A pleasing instance of Mr. Murray's attention to the cause of literature, as well as to his friend Mr. Pope's increasing fame, occurred at Cambridge, and occasioned the following short letter from the learned and ingenious Mr. *Smart*, whose Odes on the Supreme Being have immortalized his name:

Sir,

Pem. Hall, Cambridge, the 6th of Nov. 1743.

Mr. Murray having told me that it would, he thought, be agreeable to you to see a good Latin version of your Essay on Man, and advised me to undertake it, though I know myself vastly unfit for such a task, I will attempt to render any number of lines that you shall be pleased to select from any part of the work, and as you approve, or dislike them, will pursue or drop the undertaking.

To
Alexander Pope, Esq.

I am, Sir, with the utmost respect, yours,

C. SMART.

I should not have presumed to have given you this trouble had not Mr. Murray assured me that I might safely venture. I have made bold likewise to send you a specimen of a translation of your Essay on Criticism, verse the 339th.

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This elegant translation extends to between forty and fifty lines of the Essay on Criticism; but, as the repetition of the whole may be deemed too great a digression, the author will confine himself to the ten last lines, which are so perfectly just and elegant as to require little apology :

Non solum asperitas teneras cave verberet aures,
Sed vox quæque expressa tuæ sit mentis imago.
Lene canat Zephyrus suspirans blanda politis
Lævius in numeris labatur, læve fluentum ;
At reboat, furit æstuat æmula Musa, sonoris
Littoribus cum rauca horrendum vapulat unda.
Quando est saxum Ajax vastâ vi volvere adortus
Tardè incedat versus, multum perque laborem ;
Non ita, sive Camilla sali viridaria rasit
Sive levis, leviterque volat sine fraude per arvom.

The few lines of Pope, which are applicable to his friend's rising fame, are too apposite to be omitted :

If not so pleas'd, at council-board rejoice
To see their judgements hang upon thy voice.
Shall one whom nature, learning, birth, conspir'd
To form, not to admire, but be admir'd,
Sigh ! while his Chloe, blind to wit and worth,
Weds the rich dulness of some son of earth ?

Pope, who well knew the vivacity of his young friend, and the brilliancy of his parts, took a fair occasion towards the conclusion of his masterly work * to awaken reflection :

Grac'd, as thou art, with all the power of words,
So known, so honour'd, at the House of Lords.
Conspicuous scene ! another yet is nigh,
More silent far, where kings and poets lie ;

* Imitation of the Sixth Epistle of the First Book of Horace.

Where Murray, long enough his country's pride,
Shall be no more than *Tully* or an *Hyde*.

Young and gay, and seduced, as he was, by seeing how despotically Pope reigned in the regions of literature, is it matter of wonder, that several of the friends of Mr. Murray, on his entrance into life, should be not a little apprehensive of his having manifested too great an attention to the *Belles Lettres* and to the regions of pleasure?

Pope himself bears testimony of the gay life his friend was inclined to lead, in his imitation of the first Ode of the fourth Book of Horace, in the following lively and beautiful lines addressed to Venus:

To Number Five * direct your doves,
There spread round Murray all your blooming loves,
Noble and young, who strikes the heart
With every sprightly, every decent part;
Equal the injur'd to defend,
To charm the mistress, or to fix the friend.
He, with a hundred arts refin'd,
Shall stretch thy conquests over half the kind.
To him each rival shall submit,
Make but his riches equal to his wit;
Then shall thy form the marble grace,
Thy Grecian form, and Chloe lend the face;
His house, embosom'd in the grove,
Sacred to social life and social love,
Shall glitter o'er the pendent green,
Where Thames reflects the visionary scene:
Thither the silver founding lyres
Shall call the smiling Loves and young Desires;

* The number of Mr. Murray's chambers in Lincoln's Inn.

There every Grace and Muse shall throng,
 Exalt the dance, or animate the song;
 There youths and nymphs, in consort gay,
 Shall hail the rising, close the parting day.

The fears, however, of Mr. Murray's friends, that the gaiety of his heart would militate against that patient assiduity, so absolutely necessary to improvement and success in his legal character, were soon laid aside, by his having been early employed in business of serious importance, which fully engaged not only his attention, but also his affections, since human nature would have revolted at the trials in which he persevered early in life, if he had not really loved his profession.

In 1732, we find our *Tyro* in the law associated with the two shining lights in the Court of Chancery, as they were emphatically styled, lord *Talbot* and lord *Hardwicke*, then his Majesty's attorney and solicitor general, in a cause of appeal heard at the bar of the House of Lords on the 12th of March, 1732-3, relating to the purchase of some South-Sea stock in the memorable year 1720.

The counsel for the appellant were

{ P. YORKE.
 { WILL. HAMILTON.

For the respondent,

{ C. TALBOT.
 { W. MURRAY.

A fine and fertile field this for our *Tyro* to travel over, to explore, and, by exploring, to exercise his dawning genius and opening talents. A year pregnant with credulity, circumvention, and fraud, could not fail, under the auspices of a *Talbot*, to be singularly fortunate and favorable to his young friend and colleague.

A respite of four days only intervened before Mr. Murray appeared again at the same bar, and was classed with the same great colleagues as counsel for the young marquis of *Annandale*. From
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so splendid and so early an introduction into business; from his being associated in his maiden causes with the two greatest luminaries of the law, we may conclude, with *Horace*, *Noscitur ex sociis*. May we not expect to find him frequently in the same good company?

Accordingly, in the following year, 1733, we find him engaged as counsel in three appeals; and in 1734 in a still greater number.

The subject of one of those appeals being of general, (the author begs leave to recall the word) of *universal import*, tending to define the relative duties between a father and his son*, the author is inclined to think, that a brief statement of it will be acceptable to the curious reader, especially as it will be detailed

* Sir Thomas Moncrief, baronet, was the appellant.

Thomas Moncrief, Esq. the respondent.

The following is merely a short extract from the appellant's case.

Sir Thomas having five children, a small estate of between 5 and 600 *l.* *per annum*, and possessed of about 5000 *l.* personal estate, gave his eldest son a liberal education, to enable him to make his way in the world. He disobliged his father by his bad conduct frequently, and finally married without his consent. The father, incensed at his conduct, refused to see him till by his future behaviour he should deserve a reconciliation, allowed him annually (without asking any part of the lady's fortune) 2000 marks Scotch, equal to 1111 *l.* and a fraction sterling. Discontented with this allowance, the son applied to the court of session for a greater; and, on the father's refusal to discover the amount of his real and personal estate, the son gave in an exaggerated account from his imagination, and obtained an interlocutor for payment of 200 *l.* a year sterling. From this interlocutor Sir Thomas appealed. Some of the forcible reasons, assigned by his counsel Mr. Murray, were,

Reason I. For that (without arguing whether parents are, by the law of nature, obliged to maintain their children in idleness, when they come to age, and may, if industrious, shift for themselves; or whether the son, "who hearkens not to the voice of his father," which the Law of Moses thought worthy of death, has not forfeited, by disobedience, the title Nature gave him to support from his father;) under the circumstances of this case, there is no colour for the respondent's claim, the appellant having voluntarily allowed,

tailed principally with a view to introduce the very striking and solid reasons assigned by Mr. Murray and his colleague with success, on the one hand, and to give profit and pleasure to those readers, on the other, who stand *in loco parentis*.

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lowed, and punctually paid, him what was sufficient to supply him not only with the necessaries, but in that cheap country with all the conveniences, of life.

II. Fathers within their private families were, from the beginning throughout the world, esteemed to have a supreme power, and were looked upon as lords and kings in their own houses; but, when they came to be restrained by the municipal law of nations, from exposing their children or putting them to death, it followed as a consequence, that they should be obliged to maintain them, while they were unable to provide for themselves; but that a son, beyond a necessary maintenance, has a right to a determinate part of his father's estate to waste in superfluities, is what, before this action, was never pretended in any country; it is apprehended to be contrary to the law of Scotland, and to have no foundation in reason, and would be productive of great inconveniences.

1. There is no doubt but that any man, who is proprietor of an estate, may, by will, disinherit a son; which could not be but upon a supposition that he had absolute power over it during his life, and might dispose of it without controul.

2. It would invert the order of nature, and subject parents to their children, if any child could, from caprice or undutifulness, force the father, as the appellant has been obliged to do in the present case, to expose his private circumstances to the world, which it might be an irreparable prejudice to him to divulge.

3. As the father only knows what fortune he intends for his son hereafter, he only can judge what maintenance is suitable to his condition; because living in plenty for the present, might unfit him for his future situation.

4. There is little danger that parents should use any power, they may have over their children, with too much rigour; the excess is seldom on the severe side, a strong bias drawing the other way. But if a child, whether dutiful or undutiful, may demand a certain quantity of his father's estate, the father is deprived of the power of rewarding virtue or discouraging vice in his children; he will have no means to enforce his directions with regard to his son's education, place of abode, or course of life: his authority may safely be slighted, when the son is sure of getting whatever his circumstances can afford, whether he will or not.

In the same year he appeared at the bar of the house of lords to defend the infant-son of colonel Chartres (whose memory is perpetuated, though not embalmed, by a monumental inscription from the pen of Dr. Arbuthnot, deeply dipt in gall) against a charge of *usury* imputed to the father. One of the reasons assigned in his defence by his counsel was of a peculiar kind; viz. that the colonel kept no regular accounts how his money was lent out, or how it was paid. The natural conclusion to be drawn from these premises was, that, at the distance of 10 or 12 years, he might forget the consideration upon which the bond was given.

It is not to be expected that Mr. Murray was equally successful in this as he was in the former animated and strong appeal. No illustration here from the Law of Moses! None from the Law of Nations! No apparent, no real, animation adorned the reasons adduced in support of the last appeal. The best and only excuse which could be made was made in plain language, as we have before stated; and the cause of the cunning unaccountable Gripus was left to its fate.

It would not have been very surprizing if the keen satirist, in his inimitable epitaph, had availed himself of this circumstance,

III. Nature knows no distinction between the eldest and the youngest child, they are all equally intitled to the parent's care and affection; and upon the law of nature only is the present action brought, there being no positive statute in Scotland which requires parents to maintain their children, or which, in that case, gives any preference to the eldest. The appellant has four other children, who have therefore the same right to maintenance that the respondent has; which shews the exorbitancy of the proportion allowed him by the decree complained of, which amounts to near a fourth of the income of the appellant's estate, real and personal.

Counsel for the respondent not appearing, the interlocutors complained off; and, the appellant's petition to the lords of session being read, the interlocutors were so far varied as that the allowance for the maintenance of the respondent be modified to 2000 marks, Scots, *per annum*.

Nota. This is the precise sum allowed primarily by the father.

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by adding to the long catalogue of the Colonel's other vices, that he was a most *unaccountable man*, who, in order to avoid detection as an usurer, kept no accounts. The consummate wisdom of this conduct, in a great usurer, may be assimilated with that of a woodcock, who, as naturalists relate, hides its head in any hollow recess, and thence sagaciously concludes that its whole body is concealed.

In the year 1735, Mr. Murray was not only deeply engaged in business himself, but was also sedulous to introduce into active life his friend Mr. Booth, then a young conveyancer; which Mr. Murray's letter of the 25th of October, 1735, worthy of the younger Pliny, will evince.

My dear Friend,

Lincoln's Inn, 25th Oct. 1735.

I received yours last night. I cannot but applaud the protection you give a sister, whom I know you love tenderly; yet it seems a little rash to carry your beneficence so far as to dry up the source of all future generosity; and I am sure it is greatly against the interest of every one who has the least dependence upon you, that you should do any thing which makes it at all difficult for you to persevere in a way where you must at last succeed. Of this I have no doubt; and, therefore, it is as superfluous to add my advice for your coming to town immediately as it would be to tell you that I omit no opportunity of mentioning your name and promoting your interest. You cannot fail, but by staying in the country, and suffering people who have not half your merit to step in before you. With regard to every thing you say of Mr. Pigot, we will talk more at large hereafter; I as little think he will bring you into his business while he lives as that you can be kept out of a great part of it when he dies. I am at present consulted upon a devise-settlement of his, whereby a great estate is left to a noble Roman Catholic family, which I am very clear is good for nothing. Can you contrive a way by which an estate may be left to a Papist? Though I have no more doubt of the case put to me than whether the sun shines at noon, I told the gentleman who consulted me, I would

would willingly stay to talk with a Roman Catholic conveyancer, &c. whom I expected soon in town, and named you to him.

I own I am desirous you should come to town; and, be assured, the best service you can do your friends is to put yourself in a way to serve them effectually. As to any present occasions you have, you know where to command while I have a shilling.

I have not seen Prowse nor Rigdum since I had yours, but I am sure they are both your servants very much. *Nil mihi rescribas, attamen ipse veni.* I am, I do assure you, with great cordiality and esteem,

Dear Booth,

Your affectionate friend and faithful servant,

W. MURRAY.

We find, from no less authority than that of lord Mansfield himself, that, in the year 1736, a great question on the law of nations was agitated before lord chancellor Talbot, wherein Mr. Murray was counsel.

“ I remember (said his lordship in Easter term, 1754), in a case before lord Talbot, of *Buvot v. Barbut*, in 1736, upon a motion to discharge the defendant, (who was in execution for not performing a decree,) because he was agent of commerce, commissioned by the king of Prussia, and received here as such; the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. These questions arose and were discussed: whether a minister could, by any act or acts, waive his privilege? Whether being a trader was any objection against allowing privilege to a minister personally? Whether an agent of commerce, or even a consul, was intitled to the privileges of a public minister? What was the rule of decision: the act of parliament, or the law of nations? Lord Talbot declared a clear opinion: that the law of nations, in its full extent, was part of the law of England; that the act of parliament was declaratory, and occasioned by a particular incident. That the law of nations was to be collected from the practice of different nations, and the authority of writers. Accordingly he

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argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershook, Wiquefort, &c. there being no English writer of eminence upon the subject. I was counsel in this case, and have a full note of it. I remember too lord Hardwicke's declaring his opinion to the same effect, and denying that lord chief justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador."

The consequences of the arrest of the Russian ambassador are not a little curious, as they are related by lord Mansfield.

"This privilege of foreign ministers, and their domestic servants, depends upon the law of nations. The act of parliament of 7th of Anne, c. 12, is declaratory of it. All that is new in this act is the clause which gives a summary jurisdiction for the punishment of the infractors of this law.

"The act of parliament was made upon occasion of the Czar's ambassador being arrested. If proper application had been immediately made for his discharge from the arrest, the matter might, and doubtless would, have been set right; instead of that, bail was put in before any complaint was made. An information was filed by the then attorney general, against the persons who were thus concerned, as infractors of the law of nations; and they were found guilty, but never brought up to judgement.

"The Czar took the matter up highly. No punishment would have been thought by him an adequate reparation. Such a sentence as the court could have given, he might have thought a fresh insult.

"Another expedient was fallen upon and agreed to. This act of parliament, passed as an apology and humiliation from the whole nation, was sent to the Czar, *finely illuminated*, by an *ambassador extraordinary*, who made excuses in a solemn oration."

A great deal relative to this transaction and negociation appears in the annals of that time.

1737.

The natural and acquired advantages, which characterized the eloquence of Mr. Murray, were so conspicuous, even on the spur of occasion, and his perception was so quick, as to enable him to shine upon any emergency. A circumstance of this kind occurred, in the year 1737, in the celebrated cause between Theophilus Cibber and Mr. Sloper, wherein Mr. Murray was the junior counsel for the defendant. The leading counsel being suddenly seized with a fit in the court, the duty of the senior devolved on the junior counsel, who at first modestly declined it, for want of time to study the case. The court, to indulge him, postponed the cause for about an hour; and, only with this preparation, he made so able and eloquent a defence, as not only to reduce the defendant's damages to a mere trifle, but to gain for himself the reputation, which he highly deserved, of a most prompt, perspicuous, and eloquent pleader.

Among other effusions of wit, and leading features of genius, Mr. Murray observed, "that the plaintiff, by his counsel, shewed himself related to William of Wickham, but would have been better intitled to have claimed that alliance, if he had observed William of Wickham's motto, That *morals* make the man! the words are *manners* make the man; but manners are there intended to signify *morals*. Again: the plaintiff tells his servants, that Mr. Sloper is a *good-natured boy*; he makes a *boy* of him. He takes his money, lets him maintain his family, resigns his wife to him, and then comes to a court of justice, and to a jury of gentlemen for reparation in damages!

"It devolves on you, gentlemen, to consider the consequences of giving damages in a case of this nature. It is of very serious consequence, and would be pregnant with infinite mischief, if it should once come to be understood in the world that two artful people, being husband and wife, might lay a snare for the affections of an unwary young gentleman, take a sum of money

from him ; and, when he could part with no more, then come for a second sum to a court of justice.

“That he desired to be understood as by no means an advocate for the immorality of the action ; for this is not a prosecution for the public, or to punish immorality ; this is only the question, whether the defendant has injured the plaintiff ; and certainly the plaintiff cannot be injured, if he has not only consented, but has even taken a price. However, gentlemen of the jury, if it should be thought requisite to find a verdict for the plaintiff, we have not a denomination of coin small enough to be given in damages.”

The jury did not give the smallest piece of coin as damages, but adopted the hint, by giving ten pounds, or a piece of bank paper of the smallest value at that period in circulation.

The familiar friends of lord Mansfield have frequently heard him recur with singular pleasure to his success in this cause, and the consequences which flowed from it. His own perspicuous manner of introducing it cannot fail to please, and raise emulation in young men of genius.

From this trivial accident he was accustomed to say : “business poured in upon me on all sides ; and, from a few hundred pounds a year, I fortunately found myself, in every subsequent year, in possession of thousands.”

It may be deemed somewhat curious to observe, that a similar accident, however trivial, brought another great luminary in the law into full business. Mr. Dunning (afterwards lord ASHBURTON) had persevered in going the Western circuit six or seven years, without any great emolument, until one of the leading counsel on the circuit, who was afflicted with the gout, and who having discovered abilities in, had engaged, our Tyro to read and make observations on his briefs ; on briefs which Mr. Serjeant Glynn's feeble hands could not support. He handed them over to his young friend, who shone so much in his new sphere, as from that day, and from the business

finess of general warrants, which trod on the heels of it, his fame, like another Murray's, was recorded. A more recent instance of patronage in a law-lord, who has twice added lustre to the first civil employment in this kingdom, ought not to be passed over in silence, since it relates to one of the shining ornaments of the profession, and might be made a prominent feature in any mirror held up to raise laudable emulation in the Tyros of promise at the bar: but delicacy to two great characters admonishes the author merely to state the simple facts. In the year 1781, the great merit of the young barrister was best known to a few select friends, of whom the late Mr. Lee, formerly his majesty's attorney general, was one—(one whose philanthropy, and goodness of heart, will ever be revered). He rejoiced in having a fair opportunity of introducing his young friend to a *patron*, whose power was equal to his inclination to foster and reward merit. In the following year, the fair emoluments of his profession rose in a tenfold degree; and it is pleasing to add, that the succeeding years have been distinguished, in every respect, with the greatest reputation, and with high professional honors.

In the same year, 1737, we find a parliamentary investigation of an important business, which required all the eloquence, all the powers, of our jurisprudent as a pleader, in mitigation of punishment. "Whereas, upon Tuesday the 7th of September, 1736, there was a most seditious and outrageous riot in the city of Edinburg, notoriously concerted and carried on by great numbers of wicked, disorderly, and blood-thirsty, persons, who did, with open force and violence, seize the arms of the city-guard, possess themselves of the city-gates, and, by setting fire to and breaking open the door of the Toll-Booth of the said city, did unlawfully and audaciously rescue and set at large several criminals therein confined: and whereas captain John Porteous, then a prisoner there, under sentence of death, but graciously reprieved by the queen's most excellent majesty, as

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guardian of the realm, was, by the rioters, in a cruel manner, dragged from the prison, and most barbarously hanged by the neck, and murdered in manifest violation of the public peace, in defiance and subversion of legal government, in high contempt of our sovereign lord the king and his laws, and to the most presumptuous and unparalleled obstruction of the royal mercy; and for some time before the committing of the said murder and riot it was commonly reported in Edinburgh, that some such atrocious fact would be attempted, which, by proper care in the magistrates, citizens, and inhabitants of the said city, might have been prevented; notwithstanding which, Alexander Wilson, Esq. the provost of the said city, and then actually resident in the said city, and fully apprized of the said wicked design, did not take any precautions to prevent the said murder and riot, nor use the proper or necessary means to suppress the same, or to preserve the peace of the said city, or, after the perpetration of the said fact, to discover, apprehend, or secure the authors or abettors thereof, in manifest violation of the trust and duty of his office of chief magistrate of the said city; nor were any means or endeavours used by the citizens and inhabitants of the said city to prevent or suppress the said notorious riot, or to hinder the said inhuman and barbarous murder, or to discover the persons concerned therein, in order to bring them to justice." Such are the serious charges enumerated in the preamble to a bill of pains and penalties brought into parliament, and which, in the year 1737, after various modifications, and a firm and unabated opposition in every stage of its progress, was passed into a law, under the title of "An Act to disable Alexander Wilson, Esq. from taking, holding, or enjoying any Office of Magistracy in the City of Edinburgh, or elsewhere in Great Britain, and for imposing a Fine upon the Corporation of the said City *."

* 10 George II. c. 34.

In both houses of parliament Mr. Murray was employed as counsel, and acquitted himself so much to the satisfaction of his clients, that afterwards, in September 1743, as we are informed by Boyse in his Historical Review of the transaction of Europe, 1747 *, Mr. Murray was presented with the freedom of Edinburgh in a gold box, professedly, as it was declared, for his signal services by his speeches in both houses of parliament, in the conduct of that business.

On this occasion a youth of fourteen tried the strength of his infant Muse, by addressing the following little poem to Mr. Murray :

Hail, glorious youth ! distinguish'd virtue, hail !
 Prop of your country and the public weal !
 Fain would my infant Muse your praise proclaim,
 To shew her ardor, not to raise your fame :
 Your fame exalted far above your praise,
 Fame which no Muse, no Bard, can higher raise.
 Oh ! with that transport were my breast inspir'd,
 Which in the public cause your bosom fir'd !
 Or were the numbers of my youthful song
 Soft as the accents of your graceful tongue !
 Then might I justly set your praises forth,
 And then might celebrate your matchless worth.
 But you are still superior to applause,
 By honor taught to aid your country's cause ;
 Your soul, a stranger to vile avarice,
 To screen the guilty thinks a sordid vice ;
 For which your country does your praise proclaim,
 Augment your glory, and renew your fame.
 Tyrants may sternly frown, and courts oppose,
 And crowds of servile souls turn honor's foes ;

* Vol. I. p. 403.

The love of gain may venal vices rule,
 And drown the spark that fires the patriot soul;
 Nor courts, nor bribes, nor even a royal frown—
 Can make your tongue the public cause disown.
 Oh! durst my tow'ring hopes attempt your height,
 And trace the mazes of your glorious flight!
 Oh! durst I hope to serve mankind like thee,
 Protect the harmless, and set nations free!
 But these are blessings Heaven bestows on few,
 Blessings which few attain, nor all pursue.
 Go on, brave youth! enjoy uncommon fate,
 And shine superior in the high debate:
 Your cause is glorious, freedom and the state.
 Go, and your morals to the last maintain,
 While we these virtues which we can't attain
 In you with ever thankful lips approve,
 And envy's lost in gratitude and love.

G. E——t.

1738.

On the 20th of November, 1738, he married lady Elizabeth Finch, one of the six daughters of Daniel Earl of Winchelsea; a marriage, which added fortune and splendid family-connections to the advantages of noble birth, and great fame, which Mr. Murray previously possessed.

With this lady he lived in great harmony and domestic happiness almost half a century. Lady Mansfield, who was exemplary through life in diligent, uniform, and unremitted attention to the discharge of her domestic concerns, and of every religious duty, died the 10th of April, 1784.

In the same year, 1738, there were fifteen or sixteen appeals heard and determined in the House of Lords, and in no less than eleven of that number was Mr. Murray employed as counsel, either for the appellants or respondents. His friend and panegyrist, Mr. Pope, might therefore with strict propriety say of him

So known, so honor'd, at the House of Lords.

1739

1739 and 1740.

In the years 1739 and 1740, we find Mr. Murray engaged in thirty cafes of appeal to the House of Lords ; a greater number, we prefume, than in the courfe of the prefent century has, in any two fucceeding years, fallen to the lot of any one of the moft eminent counfel at the bar, thofe great luminaries Talbot and Yorke not excepted ; fo rapid, fo extenfive, and fo unparalleled was the fuccefs of Mr. Murray ! And when it is confidered, that ten years only intervened between the commencement of his practice at the Chancery bar in 1732, and his appointment to the office of folicitor-general in 1742, a very flattering and fair conclufion may be drawn, that his legal fame and his extenfive practice were not confined to the House of Lords. One of thofe cafes of appeal is, it muft be confefled, of a complection which deferves particular notice *. Cafes of appeal to this high court of
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* It is that of an Irish widow, who claimed dower out of the eftate of her late husband. This cafe depended entirely on the conftruction of an act of parliament made in Ireland in the fixth year of the reign of queen Anne, c. 16. by which it was enacted, That if any perfon or perfons fhould, by any fubtle means, or fecret infinuations and delufions, threats or menaces, perfuade or procure the fon and heir apparent, or other fon of any perfon or perfons having lands, tenements, or hereditaments, of the yearly value of 50*l.* or perfonal eftate of the value of 500*l.* or fhould in manner aforefaid perfuade or procure the eldeft fon, or any other fon of any perfon or perfons deceased, to contract matrimony without the privity or confent of the parents or guardians of fuch eldeft or other fon, and fuch matrimony be had as aforefaid before fuch fon attained the age of twenty-one years, every fuch perfon or perfons contracting matrimony without the privity and confent of fuch parent or guardian ; and in cafe there be no parent or guardian appointed, then and in fuch cafe of the lord chancellor, lord keeper, or commissioners of the great feal for the time being ; fhould be, and was thereby, rendered incapable, and for ever difabled, to fue for, recover, or demand any dower, thirds, or any other part of the real or perfonal eftate of fuch fon or fons, or claim or demand any jointure or other provision out of the real or perfonal eftate of fuch fon or fons, made to, or in truft for her, by any will, deed, or fettlement whatfoever.

In 1726 the defendant Catharine, who was the widow of John Kent deceased, brought her writ of dower in the court of Common Pleas in Ireland againft the plaintiffs, thereby demanding her third of certain lands in Kil-
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judicature are generally confined to subjects so private, local, and uninteresting to the public, as to have precluded the author of these sheets from attempting even a short analysis of those wherein
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kenny, which were the freehold and inheritance of her husband. The plaintiffs obtained leave to plead double. Each put in two several pleas. The first, that John Kent was not seised of such an estate in the lands as was dowable, and issue was joined upon that fact. The second plea was, that Catharine, on the first of May, 1721, by subtle means, secret insinuations and delusions, threats and menaces, persuaded and procured the said John Kent, her late husband, and the eldest son and heir apparent of John Kent the elder, to contract matrimony with her, without the privity or consent of the said John Kent the elder, who was then alive, and had lands and tenements in fee simple, of the yearly value of 50*l.* and above; and that the said John Kent, formerly the husband of the said Catharine, was then of the age of eighteen years and no more, and never had any guardian except his father; and that neither the lord chancellor of Ireland, nor the keeper of the great seal of Ireland for the time being, consented to the said marriage. Catharine replied to the second plea, that she did not, by subtle means, &c. persuade or procure John Kent to contract matrimony with her without the privity and consent of his father; and they joined issue. Both the issues were tried at the Lent assizes in 1727; and as to the first, the jury found, that the husband died seised in fee simple of lands, the third part whereof was of the yearly value of 79*l.* 5*s.* 9*d.* And as to the second plea, the jury found a special verdict to this effect: That Catharine contracted matrimony with the said John Kent without the privity of her husband's father; that her husband was under the age of twenty-one at the time of the marriage, and was the eldest son and heir apparent of his father, who was seised of lands in fee simple of the yearly value of 50*l.* and upwards, but that Catharine did not persuade or procure John Kent to contract matrimony with her by subtle means or secret insinuations, delusions, threats, or menaces. In Michaelmas Term, 1727, the court of Common Pleas, after several arguments, were of opinion, that Catharine was entitled to her dower, and gave judgement accordingly.

The opponents brought a writ of error in the King's Bench in Ireland; and, after various proceedings in 1731, judgement was affirmed in the King's Bench in Ireland. Notwithstanding these concurrent determinations, a writ of error was brought in the King's Bench in England, and in 1733 the judgement out of the Common Pleas in Ireland was affirmed. November 1734, a writ of error was returnable in the House of Lords, and, by the death of one of the plaintiffs in error, a petition in January 1735 was presented to enlarge the time for bringing a new writ of error. In 1736, the defendant Catharine was innocently the cause of some delay, by marrying Robert Whitby, a second husband; but the cause being revived, and Kent
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Mr. Murray was early engaged as counsel, except in one or two striking instances.

and May having made default in Hilary Term 1736, the court of King's Bench in Ireland gave judgement, that Robert Whitby and Catharine his wife should have seisin of her dower.

On the 12th of March, 1736, John Kent and James May brought a writ of error upon that judgement, returnable in parliament, which, on the 30th of March, 1738, was, by the House of Lords, declared to be null and void, and the same was ordered to be quashed, because the record could not be removed into the House of Lords here without passing through the court of King's Bench in England; and accordingly, the plaintiff in error brought a writ of error, returnable in that court; and in Michaelmas Term, 1738, the judgement of the court of King's Bench in Ireland was affirmed without opposition.

The plaintiffs in error have brought a writ of error in parliament, and have assigned the general errors; and Robert Whitby and Catharine his wife have put in a joinder in error.

Mr. and Mrs. Whitby humbly hoped that, after so many determinations in their favor, the judgement of the court of King's Bench in England would be affirmed, for the following obvious reasons, among several others:

- I. That, as Catharine Whitby cannot be said to have been guilty of any offence against the statute, there was no foundation to deprive her of her just right.
- II. Because the act of parliament, being in nature of a penal statute, ought to be construed strictly, especially in the case of dower, which has always been very much favored in law.

In this case they were not disappointed; the lords affirmed the judgement in her favor, with 100*l.* costs.

We have now travelled through the history of a lady's suit at law for the recovery of her dower, pursued it through all its windings and labyrinths in Ireland and in England, and have fortunately brought it to a successful conclusion. How forcibly must the many years litigation in the cause have struck the vigorous mind of our young jurisprudent! Must not the long delay, the obstinate perseverance, and the unrelenting persecution of her opponents, have been deemed by her animated and very able counsel, Mr. Murray, to have been vexatious, oppressive, productive of inconvenience, and of injuries which ought, by all possible means, to be prevented in future?

The ladies of Great Britain may with great reason triumph, that no delay of a similar nature can be found upon the records of the earl of Mansfield's administration of justice in the court of King's Bench in England. And we beg permission to add, that the ladies of Ireland may in their turn rejoice, that the same lord chief justice, who ultimately conducted Mrs. Whitby's cause to a desirable conclusion, lived long enough to see the right of appeal from the courts of judicature in Ireland to those in England abolished.

Par nobile Fratrum!

The two great Luminaries of the State ;

Mr. PITT, late EARL of CHATHAM,

and

Mr. MURRAY, late EARL of MANSFIELD.

To shew the coincidence of the characters of these illustrious men, the following brief sketch is with great diffidence attempted. In their juvenile academical exercises they were generous rivals. They commenced their political life nearly at the same period, were generally opposed to each other in the House of Commons, and were rivals for pre-eminence.

Mr. Pitt, the great opposer of Sir Robert Walpole's and of Mr. Pelham's administrations, took his seat in the house as a member for Old Sarum in 1740.

Mr. Murray, having previously and prudently determined to establish his fame in the line of his profession, before he commenced his political career, did not take his seat in parliament as member for Boroughbridge till the year 1742*, soon after he had been appointed his Majesty's solicitor-general. The reason he assigned for resisting the solicitation of his friends to sit in parliament, some years antecedent to that period, was, that he

* 22 Nov. 1742, the house ordered a new writ for electing a burgess for Boroughbridge, in the room of James Tyrrell, Esquire. William Murray, Esquire, lately appointed solicitor general, on the resignation of Sir John Strange, was unanimously elected. Commons Debates, 1742.

found many very respectable friends on both sides of the house. His own forcible and favorite question could not easily be answered: Why should he be hasty in forming his attachment to one party, while he enjoyed the patronage of all parties?

In the year 1743, we find the two young statesmen displaying their brilliant talents, and captivating the house with a species of oratory, which would have reflected honor on a Demosthenes or a Cicero, the one fulminating in opposition to the measures of government, probably with a view to convince the minister of the day, that he must submit to have a dangerous and powerful opponent, until he was disposed to receive and court his support, as a valuable acquisition to his party; the other, partly by choice, partly from attachment to the minister for his early appointment of him to the rank of his majesty's solicitor-general, was the firm supporter of the measures of government. To discuss the characters of these great men with any degree of precision would be an arduous undertaking, an Herculean task! The following traits of comparison are only offered as faint and imperfect outlines of character:

OF MR. PITT.

I. The eloquence of Mr. Pitt may be compared to a mighty torrent, impatient of restraint, rushing with impetuosity, and bearing all down before it, leaving behind the vestiges of its all-commanding sway, to imprint on the minds of thousands the imminent danger of future inundation.

II. Mr. Pitt possessed all the fire and dignity of Demosthenes, commanding respect, which was frequently matured as his periods flowed, and, ere his declamation was ended, respect was exchanged for, or converted into, profound veneration!

His animated answer in the House of Commons to an accusation of Horace Walpole's, the brother of Sir Robert, then prime minister, will best evince the nature and irresistible force of his oratory.

oratory. And although the celebrated Doctor Johnson is, by learned men, allowed to have been the person who penned all that has hitherto appeared in print on the subject; yet, on the authority of a very correct note taken by a dignified legal character, who was present when Mr. Pitt seized the attention of the House, the following speech puts in its claim for pre-eminence:

“ Sir,

“ The atrocious crime of being a young man, which the honorable Gentleman has, with so much spirit and decency, charged upon me, I shall neither attempt to palliate or deny, but content myself with wishing that I may be one of those whose follies cease with their youth, and not of that number who are ignorant in spite of experience. Whether youth can be imputed to any man as a reproach, I will not assume the province of determining; but surely age may justly become contemptible, if the opportunities which it brings have passed without improvement, and vice appears to prevail when the passions are subsided. The wretch, who, having seen the consequences of a thousand errors, continues still to blunder, and whose age has only added obstinacy to stupidity, is surely an object of contempt or abhorrence, and deserves not that his grey head should secure him from insult; but much more, Sir, is he to be abhorred, who as he is advanced in age has receded from virtue, and become more wicked with less temptation, who prostitutes himself for money which he cannot enjoy, and spends the remainder of his life in the ruin of his country. But youth is not the only crime I have been accused of: it has been said I have acted a theatrical part. A theatrical part may either imply some peculiarities of gesture, or a dissimulation of my real sentiments, and the adoption of the opinion and language of another man. In the first sense, the charge is too trifling to be confuted, and deserves only to be mentioned to be despised. I am at liberty, like other men, to use my own language; and though perhaps I may have some ambition to please that honorable

ble Gentleman, I shall not lay myself under any restraint, nor very solicitously copy either his mien or his diction, however matured by age or experience. If any person by charging me with theatrical behaviour shall imply that I utter any sentiments but my own, I shall treat him as a calumniator and a villain, nor shall any protection shelter him from the treatment he deserves. I shall, on such an occasion, without scruple, trample upon all those forms with which wealth and dignity entrench themselves; nor shall any thing *but age* restrain my resentment—*age*, which always brings one privilege, that of being insolent and supercilious without punishment. But, with regard to those Sir, whom I have offended, I am of opinion, that if I had acted a borrowed part, I should have avoided the censure. The heat which offended them is the ardour of conviction, and that zeal for the service of my country, which neither hope nor fear shall ever influence me to suppress. I will not sit unconcerned while my liberty is invaded, nor look in silence upon public robbery. I will exert my endeavours, at whatever hazard, to repel the aggressor, and drag the thief to justice, whoever may protect them in their villany, or whoever may partake of their plunder.”

III. Early in life Sarah duchess of Marlborough remunerated Mr. Pitt for his services to his country by leaving him a legacy in the following words: “I give to William Pitt, of the parish of Saint James within the liberty of Westminster, esquire, the sum of 10,000*l.* upon account of his merit in the noble defence he has made for the support of the laws of England, and to prevent the ruin of the country.” The political tenets and the conduct of the noble duchess, in her opposition to Sir Robert Walpole’s administration, are too well known to need any comment; yet the receipt of this legacy had not any inherent attraction, any talismanic virtue, to prolong or perpetuate opposition to the measures of government.

IV.

IV. When Mr. Pitt became susceptible of love, and turned his thoughts to domestic happiness, the respectable addition of fortune, and of family connections, were not overlooked, nor disregarded.

Lastly, The transcendent abilities of Mr. Pitt were employed in, and confined to, the investigation of political subjects. He entered the House of Commons full of vigor, health, and animation. The emanations of his vigorous mind were in their meridian glory in the midst of a long debate; and as he generally entered the house fresh, powerful, and panting for victory, like a celebrated champion entering the lists of the Olympic games, so, at the close of his parliamentary contest, like Virgil's Entellus, he might justly conclude,

Hic victor cæstus artemque repono.

OF MR. MURRAY.

I. The silver Thames, meandering through a rich and long extent of country, fertilizing the adjacent banks, and giving grace and beauty, in addition to great riches, wherever its refreshing waters flow, may be deemed the fair emblem of Mr. Murray's eloquence:

“ Though deep, yet clear; though gentle, yet not dull;

Strong without rage, without o'erflowing full.”

Sir John Denham's Cooper's Hill.

II. Mr. Murray had confessedly formed himself on the best models of eloquence. His voice was mellifluous, his manner engaging; and whenever he exerted his powers, and employed his eloquence in any important cause or debate, he never failed to conciliate the good opinion, the respect, and veneration of the audience.

From one important cause, discussed under peculiar circumstances, and at a period when, in addition to the taunts of an
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individual of *superior talents* to most men, party-prejudice ran very high, when terrors were hung out, and even personal violence denounced, Lord Mansfield, with great animation, repelled the attacks made upon himself and his colleagues in the court of King's Bench.

To pourtray the numerous shades of distinction between the speeches of Mr. Pitt, the disciple of Demosthenes, and Mr. Murray, the lover of Ciceronian eloquence, would require volumes, and would not fail to form a splendid system of British oratory; but the selection of a few sentences from a very animated speech (which the studious reader will have the pleasure of finding among the singular events of the year 1768 in the Second Chapter of this work) will, it is to be hoped, be sufficient for the present purpose.

“It was our duty, as well as our inclination, sedulously to consider, whether, upon any other ground, or in any other light, we could find an informality in the proceedings, which we might allow with satisfaction to our own minds, and avow to the world.

“But here, *let me pause!* it is fit to take some notice of the various terrors hung out. The numerous crowds which have attended, and now attend, in and about the hall, out of all reach of hearing what passes in court, and the tumults which in other places have shamefully insulted all order and government, audacious addresses in print dictated to us from those *they call the people*, the judgement to be given *now*, and afterwards upon the *conviction*. Reasons of *policy* are urged, *from danger to the kingdom*, by commotion and general confusion.

“Give me leave to take the opportunity of this great and respectable audience, to let the whole world know *all such attempts are vain*. Unless we have been able to find an error which will bear us out to reverse the outlawry, it must be *affirmed*. The constitution does not allow reasons of state to *influence our judgements*:

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God forbid it should ! We must not regard political consequences, how formidable soever they might be. If rebellion was the certain consequence, we are bound to say, '*Fiat justitia, ruat cælum.*' The constitution trusts the *king* with reasons of state and policy. He may stop prosecutions. He may pardon offences. It is his to judge whether the law or the criminal should yield. We have no election. We cannot pardon. We are to say what we take the law to be. If we do not speak our *real* opinions, we prevaricate with God and our own consciences.

" I pass over many *anonymous* letters I have received. Those in print are public ; and some of them have been brought judicially before the court. Whoever the writers are, they take the *wrong* way. I will do my duty unawed. What am I to fear ? that *mendax infamia* from the *press*, which daily coins false facts and false motives ? The lies of calumny carry no terror to me. I trust, that my temper of mind, and the colour and conduct of my life, have given me a suit of armour against *these* arrows. If, during this king's reign, I have ever supported his government and assisted his measures, I have done it without any other reward than the consciousness of doing what I thought *right*. If I have ever opposed, I have done it upon the points themselves, without mixing in *party* or *faction*, and without any collateral views. I honor the king, and respect the people ; but many things acquired by the *favor of either* are, in my account, *objects not worth ambition*. I wish popularity ; but it is that popularity which follows, not that which is run after ; it is that popularity which, sooner or later, never fails to do justice to the pursuit of *noble* ends by *noble* means. I will not do that which my conscience tells me is *wrong*, upon this occasion, to gain the applause of thousands, or the daily praise of all the papers which come from the press. I will not *avoid* doing what I *think* is *right*, though it should draw on me the whole artillery of libels ; all that falsehood and malice can invent, or the credulity of a de-

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luded populace can swallow. I can say, with a great magistrate, upon an occasion, and under circumstances not unlike, *Ego hoc animo semper fui, ut invidiam virtute partam, gloriam non invidiam putarem.*

“Threats go farther than abuse; personal violence is denounced. I do not believe it. It is not the genius of the worst of men of *this* country in the worst of times; but I have set my mind at rest. The last end that can happen to any man never comes too soon, if he falls in support of the *law and liberty* of his country (for liberty is synonymous to law and government). Such a shock too might be productive of public good. It might awake the better part of the kingdom out of that lethargy which seems to have benumbed them, and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety.”

III. In his entrance into public life, when Mr. Murray, as the younger son of a noble family, did not enjoy any landed property, Mr. Vernon, a mercer on Ludgate-Hill, and a reputed friend to Jacobitism, gave and devised an estate in the counties of Chester and Derby to the honorable William Murray, his heirs and assigns for ever. The devisee took possession of the estate, but the only gratitude he evinced was that of preserving this first-fruits of territorial property in his family, where it yet remains. Mr. Murray retained the gift, without imbibing, or adhering to the tainted principles of the donor*.

IV.

* Mr. Vernon was one of the descendants of a very antient family, who had been for many centuries in possession of the devised estate, which, at the least, was equal in value to the duchess of Marlborough's legacy of 10,000*l.* to Mr. Pitt, afterwards earl of Chatham. The curious reader will probably be pleased with any accurate explanation of the foundation whereon the fine superstructure of a devise of antient patrimony was built. Mr. Vernon had a son, who was educated at Westminster school, and who was contemporary with Mr. Murray. An early friendship between those college-youths was fostered by the father, who conceived that it could not fail to be

IV. On Mr. Murray's marriage with one of the daughters of the earl of Winchelsea, the acquisitions of fortune and family-connections were splendid and permanent.

Lastly. Mr. Murray's shining abilities were displayed in all the vicissitudes of argument and debate. He might truly say, with his friend and favorite Tully, with a little variation, *Non nobis nati sumus ; partem leges, partem præsidium, partem patria, sibi vindicant.* Lord chancellor Hardwicke in the Court of Chancery claimed (and could bear ample testimony to) many hours of exertion, on the part of Mr. Murray, in the *morning*. The council-chamber, or the bar of the House of Lords, put in their irresistible claim to still greater exertions about noon ; and though last, not least in his esteem, if we may form a judgement from many excellent speeches made in the house of commons ; he entered the lists with the greatest of all rivals, Mr. Pitt, who, with a degree of candour worthy of himself, admitted that he generally found in Mr. Murray a fair, open, and formidable rival.

Can any tribute of applause be more animated than that which flowed from lord Chatham, on a great occasion in the house of lords, when, in answer to lord Mansfield, he said, " My lords, I must beg the indulgence of the house ; neither will my health permit me, nor do I pretend to be qualified to follow that noble lord through the whole of his argument. No man is better acquainted with his abilities and learning, nor has a greater respect for them than I have. I have had the pleasure of sitting with

of mutual benefit to each of the tyros. When Providence was pleased to dissolve the bond of amity, and leave Mr. Vernon childless, he seems to have formed the resolution of adopting the fast friend of his son. To adduce proof ; in the year 1738, and on the very interesting occasion of the marriage of Mr. Murray with the daughter of a noble earl, familiar letters from Mr. Vernon fully evince, that his great regard for Mr. Murray was deeply riveted, and that, by adoption, he considered himself as standing forward on that happy occasion in the place of a parent.

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him in the other house, and always listened to him with attention. I have not now lost a word of what he said, nor did I ever."

In the same house, and on another great occasion, lord Chatham having quoted lord Somers, and lord chief justice Holt, in support of his law, and having drawn their characters in splendid colours, turning to lord Mansfield with a truly dignified gesture, "I vow to God, I think the noble lord equals them both in abilities!"

In the administration of the late duke of Newcastle, and his brother Mr. Pelham, the life of the earl of Mansfield was that of a most able advocate and an active statesman, who assisted those ministers in the great work of balancing parties, and combating the very powerful opposition to their administration.

By a steady attachment to his principles and his party, he obtained, and justly merited, all the praise that is due to consistency. Many pages might, with great facility, be filled with fine speeches ascribed to the honorable Mr. Murray. But when it is considered, that many of those speeches were made either in support of treaties with, or assistance to be given by this country to foreign powers, and on other local and particular subjects, which by length of time are become less interesting, however applauded at the time at which they were delivered; it is needless to repeat them here. It will be sufficient to present the reader with a few select speeches delivered by him when his majesty's solicitor general, and when, in his more dignified situation of a peer of the realm, he enjoyed the most commanding influence. Alas! all his lordship's own records of himself; all his manuscripts, notes, and papers, were destroyed in the horrid riots of 1780.

His language was impelled by the weight and dignity of the subject which he discussed. He spoke from his feelings; and his fine tone of voice, which gave him the appellation of the silver-tongued Murray, rose in due proportion, as he was warmed with the

the subject, all appeared to be in perfect unison. He was in debate lively and copious, perspicuous without constraint, mellifluous without exuberance, and convincing without ostentation!

His mind was vigorous in an uncommon degree; and so retentive was his memory, that, at any distance of time, he would repeat any arguments or anecdotes he had heard, with all their combinations of circumstances, to the astonishment of strangers, and to the great admiration and entertainment of his friends.

Nature had endowed him with most singular powers of comprehension. These, aided by the most extensive reading, and the study of the most celebrated authors, made him ever capable of illuminating the darkest subjects. Rarely do irresistible powers of conviction and pleasing manners unite in one person.

But, while elegance of language and force of sentiment have charms to please, the remembrance of the earl of Mansfield's natural and acquired endowments cannot fail to secure universal admiration. What inexpressible delight was it to participate the pleasantry and ease of his conversation, in those convivial hours, where true greatness is exhibited to our view without reserve; where the genuine effusions of a well-informed mind are conspicuous without design, and where elegance and simplicity unite, without affectation to form a finished character! Mr. Murray, if the allusion may be pardoned, was, "when unadorned, adorned the most."

In private discourse at his table, he would enliven and entertain his guests with the purest attic wit, and thus improve the flavor of the choicest wines. At one time, curious historical facts engaged their attention; at another, anecdotes of the most celebrated men were related by him with engaging ease and uncommon accuracy.

To endowments naturally great, he added, with solicitude and uncommon success, the refinement of improvement by studying the best compositions. He not only knew how to polish the diamond, but also to enhance the value by a judicious display of its lustre. Yet, although he was industrious to excel others, no
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one was a greater admirer of excellence in other men. He left, to minds less enlarged than his, the invidious pursuit, the pain of damping or depressing rising genius. The heart-felt pleasure was his, of seizing every fair occasion to confer on dawning genius his friendly countenance, advice, and support !

He was an excellent judge of men and things. Early in life he was susceptible of the passion of friendship, and seemed to think its laws were sacred and inviolable. Some of his familiar letters, to his friends in the profession of the law, have been preserved, which do honor to his heart ; and which in elegance and ease are not inferior to the letters of Pliny.

In his eloquence at the bar and on the bench, we view the perfect image of a mind that was naturally clear and susceptible of the finest impressions, of a mind that was considerably improved by making the great Roman orator, Cicero, his great example and his theme.

His imagination was so fruitful and lively as to profit by the least hint. He had the felicity of adorning and enriching every subject he discussed ; and, as it were, from dying embers to raise a pure flame. Yet, in his judicial capacity, if the brilliancy of his imagination, and the quickness and perspicuity of his conceptions, secured the applause of a considerable part of the audience, the soundness of his judgement was sure to captivate the rest. A judgement like his, which was naturally good, ripened early into exquisite sensibility and distinguishing sagacity. In this instance, he verified the justness of Dr. Johnson's opinion, that it is ridiculous to oppose judgement to imagination, since it does not appear that men have necessarily less of one, as they have more of the other.

In fine, the clearness of his head enabled him to solve and surmount the most difficult and subtle points of law ; to develop the mazy labyrinths of pleading, as it were by intuition (since the science of pleading had not engaged his early attention, or formed a part of his studies) ; and the perspicuous manner in which he expressed his thoughts never failed to satisfy
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and convince all parties. He very rarely had the facility of his flowing periods interrupted by hoarseness, or impeded by thirst. After having waited for his regular meal, through the press of much and tedious business, to a late hour in the evening, he has repeatedly said, that he never knew what it was to be thirsty, or faint with hunger.

Thus the imagination of this illustrious man seemed to be ever on the wing, ever soaring, yet never sensible of fatigue, the usual concomitant of great exertions.

To promote substantial justice was his great and constant labour: the code of commercial laws, which he confessedly established on this solid principle, shed its happy influence far and wide. His own researches and approved adjudications, like a polar star, guided his matured judgement; enabled him to meliorate those laws, in the study of which he had spent his early life; and in the discussion and illustration of which he had, so early as in 1742, displayed so much acumen, ability, quickness, and pre-eminence, as to be deemed the shining ornament of the Court of Chancery.

In 1743,

On a motion in the house of commons to address his majesty, that he would be pleased to give directions for the dismissal of the Hanoverian troops, the honorable Mr. Murray, his majesty's solicitor general, was called up in defence of the prerogative of the crown.

“The motion now under our consideration is of such a new and extraordinary nature, and such a direct attack upon the prerogative of the crown; that I should think myself very little deserving of the honor his majesty has been pleased to confer upon me, if I sat still, and heard such a motion made without saying any thing against it. Every gentleman, who has the honor to be a member of this house, and views the question in the same light I do, is in duty bound to give his vote against it; but, from the post I hold under the crown, I think myself obliged to give my reasons against the motion, as well as my negative to the question. By our constitution, sir, the crown has its powers and prerogatives, as well as the people
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their liberties and privileges, the overthrow of either would be an overthrow of our happy constitution; and no violent attack has ever yet been made upon the former, but what ended in the destruction of the latter; therefore, as members of this house, and as guardians of the liberties of the people, we are obliged to protect the prerogatives of the crown, and to be careful never to make any encroachment upon them. Among the prerogatives of the crown, one of the chief is, that the king has not only the sole power of declaring war, but the sole command and direction of its prosecution. He alone is to judge and determine how and in what manner; with what forces, and what sort of forces, the war is to be carried on; how our armies are to march, or our squadrons to sail; and when they are to attack, or when keep upon the defensive. All this, I say, the king has, by his prerogative, the sole direction of; but, if this motion should be agreed to, I should not be at all surprized to see a venerable member of this house, who perhaps never was out of the island, nor ever saw an army or a squadron in his life, rising up, and gravely moving to address his majesty, to order his army, or his squadron, to engage the enemy, without knowing any thing of the situation or circumstances of either.

Gentlemen may smile, sir, at this inference; but I must think that such a motion would be full as reasonable as the present motion. As we know nothing of the present circumstances or views of any one court in Europe, except what we have learned from common newspapers, which is a sort of knowledge that is not I am sure to be depended on; it is impossible for us to judge what is the best method for giving effectual assistance to the queen of Hungary; and, if it can be supposed that our assisting her with our money and our navy will be any way effectual, surely our assisting her with our troops, as well as our money and our navy, will be more effectual. The best and most certain way of judging in this case for us, is to judge by the effects, and from them, if we form a judgement, we must conclude, that his majesty has chosen the best method for giving her assistance. Let us consider the circumstances of Europe, when our ministers first resolved to send our troops to Flanders, and compare them with the present: if we do, must we not acknowledge, that a happy change has been brought about in that short period of time? I know it may be, and has been, said, that this change has been brought about by the bravery of the queen of Hungary's troops, and the bad conduct of the French generals; but, in all political events, it is easy to assign other reasons besides the true one. I shall readily acknowledge

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ledge the bravery of the queen of Hungary's troops, and the fidelity of her subjects; but they must have been overwhelmed by numbers, if Prussia and Saxony had not been brought off from the French alliance; and though this did not happen till some time after we began to send our troops to Flanders, yet it is highly probable that our resolving upon that measure had an effect upon the counsels of both these princes; for from that measure they perceived, that this nation had then begun, and was resolved to act vigorously, and with all its force, for the support of the queen of Hungary, which would render the success of the schemes, they had then in view, much more precarious; and, at the same time, it left them more at liberty to shew their resentment upon the ill treatment they had met with, or might meet with, from France. It may therefore be reasonably supposed, that this defection, which I look upon as the æra of the queen of Hungary's triumphs, was chiefly owing to our resolving to send a body of our troops to Flanders.

But it is very well known, that France had then above one hundred thousand regular troops on foot, besides those employed in Germany. If that court had thought themselves in no danger at home, what could have hindered them from pouring in their whole army into Germany, which, with the emperor's forces and the armies they had there before, would have formed such a numerous and powerful army as the queen of Hungary, with all her forces, could not have withstood? This they might certainly have done; this they would probably have done; but our sending our troops to Flanders made the court of France apprehend an attack at home, which made it dangerous for them to send their disciplined troops out of the kingdom. 'Tis true, we could not without the Dutch propose to form an army of above fifty thousand men in Flanders; but the French court could not be certain that the Dutch would not suddenly resolve to join us; and if they had, as their troops were all in the neighbourhood, they might, in a few days, have joined our army with fifty thousand men, which would have made the allied army one hundred thousand; and this would have been equal to any army the French could have brought against us.

Besides this, sir, the French neither did nor could know where we designed to begin the attack. We might have begun it upon Dunkirk; we might have begun it upon the side of Lorraine, which borders upon the queen of Hungary's province of Luxemburgh; and as these two countries are very distant the one from the other, as the French troops must make a
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great circuit round the Austrian Netherlands, in marching from one of those countries to the other, they were obliged to keep great bodies of regular troops in both, as well as along their whole frontier between the two, in order to be ready to defend themselves wherever we should begin the attack. In these circumstances, even an army of fifty thousand men must oblige them to keep near double that number upon their frontier; and the uncertainty they were in with regard to the Dutch, who had resolved upon a third augmentation of their troops, about the same time that we resolved upon sending a body of ours to Flanders, could not but make it necessary for the French to keep above one hundred thousand men upon that extensive frontier, which was in danger of being attacked by the allied army. Therefore it must be acknowledged, that our beginning to form an army in Flanders, in the year 1742, disabled the French from sending the necessary reinforcements into Germany; and this enabled the queen of Hungary to make those advantages of the retreat of the Prussian and Saxon troops, which would otherwise have been prevented by the arrival of new and numerous French armies.

As the Dutch continued obstinate in their pacific sentiments, as there were no hopes of bringing them off from their beloved neutrality, the design of making an attack upon France, by the way of Flanders, was laid aside; and it was resolved to employ our army there in assisting to drive the French troops entirely out of Germany, that so the emperor, being left destitute of all support, might the more easily be induced to agree to such terms as would establish, upon a firm basis, the tranquillity of his native country, and the balance of power in Europe. For this purpose our troops began to march from Flanders towards Germany early in the spring; and their march had such an effect, that Germany is now entirely free from French troops; the queen of Hungary is in possession of the emperor's hereditary countries; and the French, instead of being the invaders of other people's territories, are now hardly able to defend their own. Upon the side of Germany, sir, these are the effects of the method his majesty has chosen for assisting the queen of Hungary; and, upon the side of Italy, the effects are equally happy. There, indeed, our navy has been of great use to us; but by our navy alone these effects could not have been produced; for if we had not, by sending our troops to Flanders, raised apprehensions in the French of having their own frontier attacked, they would probably have sent such a considerable body of the troops to the assistance of the Spaniards in Savoy

as might have enabled them to force their way into Italy, and, perhaps, to compel the king of Sardinia to submit to their terms; but by our raising these apprehensions in the French, and thereby disabling them from sending any reinforcement to the Spaniards, the latter have been obliged to remain in Savoy; the king of Sardinia remains firm to his alliance with the queen of Hungary; the duke of Modena has been stripped of his duchy; and the king of the Two Sicilies has been obliged to withdraw his troops from that army of the Spaniards, which, by the neglect or pusillanimity of a former minister, was allowed to be transported by sea to Italy.

Thus, sir, we see, that upon every side the most happy effects have been produced by the method his majesty has chosen for assisting the queen of Hungary; and from thence, I think, I have reason to conclude, that it is the best method his majesty could have chosen, and that it ought not to be altered, unless some new and extraordinary event should make an alteration very apparently necessary. If then it be necessary to assist the queen of Hungary with troops, as well as with our money and our navy; I hope it will not be said, that we can assist her effectually with our own troops alone, and without taking any foreign troops into our pay; for, if this should be resolved on, it would be necessary to increase our national land-forces, to double or treble what we have at present on foot; and no one, I believe, will say that this will be consistent, either with the preservation of our constitution, or the preservation of our trade. From hence I must conclude, that, in order to assist the queen of Hungary effectually, and in that manner which has already produced so happy effects, we must have foreign troops in our pay; and till it is made plain to me that we can have the same number of foreign troops from some other potentate, and at as cheap a rate as we have this body of Hanoverians, I must be against the present motion; and should, till then, be against it, even supposing I were to be convinced of its being perfectly agreeable to our constitution. As to the insinuations that have been thrown out in this house, and industriously spread without doors, of the cowardice of the Hanoverian troops, of their disobeying the orders of our generals, and of the jealousies and heart-burnings that have arisen between them and our British troops, I have made all the inquiry I could into the truth of these insinuations; and I find, they proceed entirely from those jealousies and animosities that naturally arise, and always do arise, between troops of different nations, when united in the same army. Those instances of cowardice, which I have heard mentioned, seem all to me to be

be instances rather of a strict discipline than of any cowardice; and, by all the accounts I have been able to collect, the Hanoverian troops seem to me to be so much under discipline, and so much masters of it, that no danger, no nor even success itself, can make them neglect it, or break through it; which, according to the opinion of all the old officers I have conversed with, is of greater use in an army, and more serviceable in the day of battle, than a rash forwardness and ungovernable impetuosity. If there was any seeming neglect of the orders of our generals, I am convinced it proceeded from some mistake, either in those that delivered, or those that received, the orders, and not from any wilful disobedience; and the disputes that arose between the British and Hanoverian troops were either about quarters, forage, provisions, or in relation to the courage of the two nations, which are disputes that never fail to arise between the troops of different nations, and often do arise between the soldiers of different regiments; but these disputes may easily be prevented from rising to any height, by a prudent conduct in the officers, especially the general in chief, and are rather of a good than a bad consequence in a day of battle, because they raise an emulation in the different corps, which contributes to the good behaviour of both. As to the partiality which, it is pretended, was shewn to the Hanoverian troops, I never could find the least ground for the insinuation; for, if they were ever furnished with greater plenty, or a better sort of provisions or forage, by all the enquiries I have been able to make, it seems to have proceeded from their commissaries and proveditors being better acquainted with the country, and more masters of the language, perhaps more masters of their business too, than those that were employed as commissaries and proveditors for the British troops. From all which I hope it will appear, sir, that this body of Hanoverian troops may be as useful to us, and as serviceable to the common cause, as any equal number of foreign troops we can take into our pay; and, if this be so, I can see no reason for our dismissing them, as long as we have occasion for keeping any foreign troops in our pay; at least we ought not to dismiss them, much less ought we to advise his majesty to dismiss them, unless we were sure of being able to supply their place by an equal number of some other foreign troops, which, I believe, no gentleman in this house can pretend to be sure of.

Whether this house ought, in any case, to offer their advice to their sovereign, is a question, sir, that, from the nature of our constitution, might admit of some dispute; because it is very certain, that this house was not designed,

signed, by its original institution, to advise, but to consent, as appears from the very words of the writ, the ancient form of which is still preserved. However, the practice has been so frequent for a century past, that we seem to be in possession, and therefore I shall not dispute our right; but we ought never to make use of it, except in cases where we have a full information, and are perfectly masters of the affair in which we offer our advice, which is not, I am sure, the case at present. We neither have nor can have a full information of all the circumstances of the affair to which this motion relates; and to offer our advice in any such case is the most certain way we can take to give his majesty, as well as the public, a mean and contemptible opinion both of our judgement and discretion, which would derogate from the influence our advice ought to have in cases where we have a full information, and can be no way accused of acting a pragmatistical part.

If the measures pursued by our administration had been attended with bad success and signal misfortunes, either to ourselves or our allies, this house would then have had some reason to enquire into the conduct of our ministers, and to call for all papers, and other evidence, that might any way contribute towards giving us a full insight into the whole of their conduct; and if we found that our misfortunes, or the misfortune of our allies, had been owing to the wrong measures pursued by them, we might then with some decency advise our sovereign to alter his measures as well as his ministers. But when our measures have been attended with unexpected success, we can have no reason for any enquiry, and much less can we have a reason for advising his majesty to alter his measures: but those measures, it seems, have been all secretly calculated, and still are secretly calculated, for the benefit of the electorate of Hanover. I confess, sir, I am not a politician deep enough to dive into the minds of men, and to discover those hidden motives which appear neither from their words nor actions. It is apparent from the effects, that our measures have contributed greatly to the success of the common cause; I mean, the support of the queen of Hungary, and the security of the balance of power; and if the electorate of Hanover had reaped, or may reap, any advantage by such measures, it would be invidious to grudge it that advantage. The effects have shewn, that our taking foreign troops into our pay has been of great service to the common cause: and, if the electorate has thereby reaped the advantage of getting a body of its troops maintained by us, we ought not to grudge it, or repine at it; for it has been no loss to us, but rather an advantage, because, if we had not had the Hanoverian troops in our pay, we must have had an
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equal number of the troops of some other prince or state, and must have paid for them; for to any other prince or state we must have paid a yearly subsidy, besides maintaining his troops, and must, perhaps, have agreed to pay that subsidy for a certain number of years, even though we should have had no occasion for his troops during the greatest part of that time. Again, sir, suppose the electorate of Hanover should get some neighbouring territory added to it by the next treaty of peace, would that be any loss or any disadvantage to this nation? Could it derogate in any manner of way from the chief end we have in view, which is that of supporting the House of Austria, and thereby preserving a balance of power in Europe? Would it be right in us to repine at the additional territory which the king of Sardinia is to have for supporting the common cause? Would it be right in us to say, that he acquires that additional territory at the expence of this nation, because we pay him a yearly subsidy for enabling him to support the common cause? The absurdity of such a reasoning is apparent; and yet we have more reason to repine at the additional territory the king of Sardinia is to acquire than at Hanover's acquiring any additional territory by the event of the present war; because the territory, which is to be added to the king of Sardinia's dominions, is to be taken from those of the queen of Hungary; consequently the encrease of power he thereby acquires is a diminution of the power of the House of Austria, and is the more dangerous, because his whole weight may upon the next emergency be thrown into that scale, which we think is already too heavy: whereas we cannot suppose that the electorate of Hanover will desire any part of the queen of Hungary's dominions: whatever that electorate may acquire by the event of the war, it can be no diminution of the power of the House of Austria; and though, from late experience, we may suspect that the weight of the king of Sardinia may, upon some future occasion, be thrown into the French scale, we cannot suspect that the weight of Hanover will ever be thrown into the scale of the House of Bourbon against the scale of the House of Austria, because of the connection between Hanover and England; and because of its being so much the interest of England to preserve the power of the latter, as a balance against the power of the former.

To insinuate, sir, that the war is now continued, and this nation put to the expence of supporting it, for no other reason, but to compel France and the emperor to consent to the making some addition to the territories of Hanover, is an insinuation of a most dangerous nature with respect to our present happy establishment, because it tends to wean the affections of the people,

people, not only from their present sovereign, but from the Protestant succession in the Hanover line. Such an insinuation, when made without the most solid grounds, can proceed from nothing but a Republican or a Jacobin spirit, which are equally dangerous to our present happy constitution; and equally, in my opinion, tend to the establishment of a tyrannical and absolute government; therefore, I was surprized to hear any such insinuations made in this house by gentlemen, who, as yet, have shewn no authentic fact, or paper, for supporting what they have thus boldly insinuated.

As for my own part, sir, I do not pretend to be, nor is it my business to desire to be, in the secrets of the cabinet, especially with regard to foreign affairs; but from the nature of things, and from all the public accounts we have, particularly those that have been published by the authority of the court of Vienna, it is to me apparent, that the war is continued for no other reason but to force the emperor and France to consent to such terms of peace as may restore the tranquillity of Europe, and secure the queen of Hungary, and consequently the balance of power, from a sudden and immediate attack from the same quarter. When the French found the flower of the army shut up in the city of Prague, almost without any practicable means of escaping, and when the emperor found himself stripped of his hereditary dominions, they might perhaps offer an armistice to the queen of Hungary; but the terms upon which they offered it was a plain indication, that they thereby meant only to get their army out of Prague, and the emperor's hereditary countries restored, in order to have a little breathing-time, and an opportunity of renewing the attack with more vigour and better conduct. This, I say, appeared to be their only aim; and this, I am persuaded, will be the only aim of any terms they may hereafter propose, unless they are compelled, by a vigorous and successful attack upon France itself, to abandon their present ambitious projects.

This, sir, is all, I believe, our ministers have at present in view by the continuance of the war, or by keeping the Hanoverian troops in the pay of Great Britain; for I never heard it so much as pretended by any of our ministers, or by any friend of theirs, that they had now formed a scheme for making conquests upon France, and giving them to the queen of Hungary, by way of equivalent for what she has yielded to Russia, Saxony, and Sardinia; and, as I do not believe they ever yet formed such a scheme, I cannot believe they ever encouraged the queen of Hungary to hope that they would enter into any such scheme, much less that they would agree to have it carried

ried into execution at the sole expence of this nation. What time, and the fate of war, may bring forth, I do not know ; but I am convinced, I say, that neither our ministers, nor the ministry of the queen of Hungary, have ever yet thought of such a scheme ; and if France, by an obstinate adherence to her ambitious views, should draw the war into her own bowels, and that war should be attended with extraordinary success, so as to make the success of such a scheme not only practicable but easy, I hope no true Englishman would be against our putting ourselves to a little additional expence, in order to have such a scheme carried into execution ; for it is certainly the interest of this nation to have the power of the house of Bourbon diminished, as well as that of the house of Austria increased ; and, if in this successful scramble the electorate of Hanover should come in for any additional territory, it would be most invidious in this nation to grudge it that advantage ; because it is what that electorate highly deserves, both at our hands and those of the queen of Hungary ; for the elector of Hanover declared in her favour, when none of the other princes of the empire durst venture to do so ; and he lent troops to this nation when, I believe, it was impossible for us to have troops, upon whatever consideration, from any other potentate in Europe.

Having thus shewn, Sir, that the advice now proposed to be given would be in itself wrong, as well as a direct encroachment upon one of the most essential prerogatives of the crown ; and having thus done what I think my duty, both as a member of this house, and as a servant to his majesty ; I shall add no more till it comes to the question, to which I shall most heartily answer —No."

1746.

In the year 1746 the trial of the rebel-lords commenced. Here the eloquence of his Majesty's solicitor-general was so conspicuous, and so generally admired, as to arrest the attention of senators, and to raise the highest degree of expectation in the minds of the audience.

The proceedings in the House of Peers upon the indictment against William earl of Kilmarnock, George earl of Cromartie, and Arthur lord Balmerino, for high treason, in levying war against his Majesty, began on Monday the 28th day of July, and continued on Wednesday the 30th of July, and Tuesday the 1st of August, 1746.

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It is well known that the earls of Kilmarnock and Cromertie pleaded guilty.

Lord Balmerino, on his being arraigned, wished to be satisfied, before he pleaded to the indictment, whether, if there were any fault in the form of the indictment, or if it was so faulty that no judgement could be given upon it, he could be indicted again.

The lord high steward answered :

“ If your lordship has any objection to take to the indictment, for mis-writing, mis-spelling, or any informality of that nature, now is your proper time to offer such exceptions.”

Lord *Balmerino*. “ My lords, I am indicted by the title of Lord Balmerino of the city of Carlisle ; and I am sure that is no title belonging to me. And I am indicted for being at the taking of his Majesty’s city and castle on the 11th of November ; and I can prove, that at that time I was not within twelve miles of it. Now, my lords, will that be of any use to me ?”

The answer given by the lord high steward was :

“ My lord Balmerino, you have made two objections of different natures ; the first of them is to the addition of place given to you in this indictment ; and the other goes to the fact thereby charged upon you. As to the first, I must inform your lordship, that the words, *late of the city of Carlisle in the county of Cumberland*, are not made part of your title, but are only an addition of place, which the law, for good reasons, requires to be inserted by way of description of the defendant in all indictments ; and it is most commonly taken from that place where the crime is by such indictment charged to have been committed. As to your other objection, it relates to the *fact alledged in the indictment*, and will depend upon the evidence, which cannot be entered into till your lordship has pleaded.”

In a few minutes, and after some farther explanation as to the proper time of making use of the objection, lord Balmerino pleaded, Not guilty. The trial was proceeded in ; and Sir Richard Lloyd, counsel for the King, Mr. Sergeant Skinner, the King’s serjeant, and Sir Dudley Ryder, his Majesty’s attorney-general, having

having all spoken in the course of the first day, his Majesty's solicitor-general, rose in his turn, but no sooner had he uttered the introductory words, "My lords," than lord Balmerino addressed himself to their lordships, observing, that he was satisfied he was mistaken, and asked their lordships' pardon for taking up so much of their time.

The solicitor-general's concise and calm address on this unexpected occasion ought to be given in his own words:

"My Lords,

"I was going to have said, I did not apprehend it necessary for me to speak upon this from any difficulty in the objection; but as the answer to the objection depended not upon natural but upon legal reasoning, and established forms; and as the noble lord had chosen not to have the assistance of counsel, in stating and enforcing his objection; I would, for his satisfaction, have said a word or two, not only to shew the matter is settled by the uniform authority of all our books, and many adjudged cases; but to have explained why it has been settled, that the treason must be laid in the indictment to have been committed on a particular day, and yet at the trial need not be proved to have been committed on that precise day. As he has declared himself satisfied, there is no occasion to say any thing."

But public expectation was not again disappointed in the spring following, upon the proceedings in Westminster Hall, in the impeachment exhibited by the knights, citizens, and burgeses, in parliament assembled, in the names of themselves and of all the commons of Great Britain, against Simon Lord Lovat, for high treason. These proceedings began on Monday the 9th of March, and continued on Tuesday the 10th, Wednesday the 11th, Friday the 13th, Monday the 16th, Wednesday the 18th, and Thursday the 19th, days of March, 1746-7.

It may be necessary to premise, that the managers of the House of Commons were, from motives of justice and humanity, prompted to counteract a most unnatural design of lord Lovat, no less than that of sacrificing his own son with a view to extenuate his own

guilt. Lord Coke, a young nobleman of a feeling heart, and most brilliant parts, though inexperienced in matters of impeachment, had the honor of being appointed one of the managers on this occasion, who closed his speech with the following sentence :

“ My lords, I say nothing to aggravate the case of the prisoner at your bar. He is already oppressed with misfortunes enough, and it is not in my nature, I hope, to add to them ; nor should I, my lords, make the following observation, did I not think myself obliged, in justice to an unfortunate young man, whom this noble lord has forced into the rebellion. He did write a letter, that he was afraid the disobedient behaviour of his son would bring down his grey hairs with sorrow to the grave ; and therefore it will not appear astonishing to you, that when he had forgot that tenderest tie of human nature, the love of a father to his child, so far as to desire to save the wretched remains of a life almost worn out, by the destruction of his own son, that he should forget his allegiance to the son of a king who saved his forfeit life, the remainder of which he has since employed in endeavouring to overturn and destroy his family, and the government established in him. I shall therefore conclude, with my honorable friend, in saying, that we are ready to make good our charge against the prisoner at the bar.”

In the writings of Addison, Pope, or Johnson, or in the English language, where shall we find a more animated, elegant, and energetic sentence than this, which flowed from the tongue of a young nobleman, the only hope of the late earl of Leicester?

Mr. Solicitor-general seems to have treasured up in his breast this interesting part of the solemn business until the sixth day of the trial, when he not only discharged his duty to the crown in summing up, and forcibly shewing, how the charges in the indictment were proved against the prisoner at the bar, but also took this opportunity towards the close of the trial to plead in behalf of the son of that prisoner, in a most graceful, long, and animated speech, of which I shall only beg permission to introduce a few sentences.

“ My Lords,

“ Though the noble lord perseveres in denying the charge, yet, as he has called no witnesses, but rests his defence altogether upon complaints, observations, and objections to the force and credibility of the evidence against him, if I was to follow my own inclination and judgement, I should think it unnecessary to say any thing upon a matter already sufficiently understood.

“ But I am told by the opinion of those, whose opinion is to me a law, that I shall not do my duty, nor perform the part assigned me, unless I close this solemn trial by calling back your lordships’ memory and attention to the principal grounds upon which we have proceeded, especially as they have now been objected to as insufficient, and complained of as setting an example which may be dangerous to innocence hereafter.

“ The gentlemen who manage this prosecution have in the course of it meant to do justice to their trust in such a manner, that the noble lord at the bar should feel the weight of truth, but not of his accusers; and it is not to aggravate guilt, or to press down the load heavier upon him, that I am at this time commanded to speak, but to satisfy your lordships now, and the world hereafter, from the nature of the evidence by which this accusation has been supported, why no part is attempted to be answered.

“ He has put your lordships in mind that the law requires you, as his judges, to be his counsel, which is certainly true; and, I am persuaded, compassion, inseparable from noble minds, has been ingenious to suggest to your thoughts doubts and objections in favour of one standing in that place, who certainly labours under some infirmities, and is allowed to defend himself by no other tongue than his own.

“ If scruples have arisen in the minds of any of your lordships, they will gain strength from that consideration; and the honest prejudice you must feel from his want of assistance may be of more advantage to him, than the ablest assistance he could have had.

“ It is proper, therefore, it may even be necessary, to endeavour to set the whole in such a view as may tend to obviate every possibility of doubt.

“ There are but two things for your lordships’ consideration upon this occasion: first, whether the evidence given is a convincing and legal proof of the charge, if it be believed? and next, whether there be any reasons to induce your lordships not to believe it?

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“The only thing in the course of this proceeding which has not yet been done to satisfy your lordships with regard to both these points is, to apply the particular evidence that has been given to the principal overt acts laid in the articles of impeachment.

“As this is the only thing which has not yet been done, it is the only thing which I shall attempt to do.

“There are three kinds or species of treason of which the noble lord at the bar stands accused by the articles.

“Compassing and imagining the death of the king, levying war against his majesty within the realm, and corresponding contrary to a late act of parliament.”

The solicitor-general having with great perspicuity distributed the evidence into three distinct classes, so as fully to support each of the separate charges, proceeded thus:

“Sir Everard Fawkener has told your lordships, that the noble prisoner did not take pains to deny his guilt; that he put the part he had acted upon repentment to the ministry for having taken away his company; that he said, for the sake of revenge, he would have joined Kouli Khan, had he come.

“His escaping after he was first apprehended, the condition and place in which he was taken, shew, that he thought his only safety lay in flight.

“After he was taken, his declarations to those who took him; his conversations with Sir Everard Fawkener, well knowing who he was, shew an absolute conviction, that the part he had acted was too notorious to be disguised.

“My lords, this being the nature and strength of the evidence, upon which the case now in judgement depends; from the precedent which may be made upon this occasion, I little thought to have heard of danger to innocence hereafter.

“If this were a doubtful matter, if it were a measuring cast, the commons had rather the guilty should escape than run a risk of the innocent being condemned. When they accuse, they desire the person accused may be convicted upon clear, satisfactory, and unanswerable proof, or not at all.

“The noble lord at the bar has complained of many hardships. Few are the trials in which such a complaint would be so little founded.

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“ He had full time to prepare for his defence. At his own request he has been indulged with adjournments during the trial. He has had all the advantages of assistance which could be given or connived at.

“ I wish the inflexible rule of law, as it still stands in prosecutions of this kind, could have allowed him to make his full defence by others.

“ The appearance of a hardship would have been removed; but, as this case is circumstanced, the removing that appearance would have helped the prosecution much more than the prisoner.

“ I speak it feelingly; I had rather reply to the ablest advocate, than do what my duty now requires of me. It is painful to the last degree to observe upon any thing which has dropped from himself; but some notice must be taken.

“ He has laboured to prove, that no credit ought to be given to the witnesses against him, because many of them are accomplices, and speak from the danger of their situation.

“ I will allow, that the hopes of life, or the fear of death, may have induced some of them to give evidence upon this occasion, but not a false evidence.

“ The same hope or fear is a security against that. When the Commons accuse, and your lordships sit as judges, what expectation can they have, but from their ingenuity and veracity? Should they be caught prevaricating, should they be detected in a false accusation, desperate were their condition indeed.

“ But the noble lord is misinformed, when he says an accomplice ought not to be believed at all till he is pardoned: if so, he could not be examined. The utmost force of the objection is no more than a circumstance to weigh in the scale against his credit; but then it must be balanced with the matter of the evidence, the manner in which it is given, the proof by which it is supported, and that by which it is contradicted.

“ The matter here is probable and consistent. Nothing of consequence rests upon a single testimony: they, who support each other, first told their stories separately, have never since had an opportunity of conferring, and therefore could not agree in a fiction. One perhaps first examined in London, another at Inverness, neither knowing what the other had, could, or would, say, kept in separate custodies ever since: it is impossible they should unite in the same falsehood.

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“The manner too in which they gave their evidence carried with it a degree of conviction. To instance in one, the behaviour of Hugh Frazer demonstrated what he told your lordships: he said, if he had no hopes of mercy, he would not have spoke at all; for, if he submitted to be examined, he must speak religiously the truth.

“The visible agonies and anguish of mind under which he labored; the ingenuity with which he answered the precise question put to him, without ever going a syllable beyond it, could not but force belief to all he said; and shewed he gave the answer because it was true, but wished not to have given it upon this occasion.

“When he first discovered what he knew, he has told your lordships, that he thought himself in the article of death; and from what he then said he never has varied since. The proof by which their testimony is supported I have already laid together in one view. To contradict them, nothing is offered.

“The noble lord says, the witnesses who could clear him are not here, though in the course of the trial we heard of his having witnesses, and what they would prove; he has not had time enough to bring them; he complains of their having been prevented; as he has not witnesses enough, he will not call any.

“These are pretexts; but he let fall the true reason why he has no witnesses. There is no making brick without straw; there is no calling witnesses without facts; there is no making a defence without innocence; there is no answering evidence which is true.

“He has not so much as suggested what these witnesses could prove if they were here.

“I will do him the justice to believe that, if he could with truth, he would not now throw the whole upon the stiff-necked, headstrong disobedience of his son. That unhappy boy is already attainted, and now actually in custody: though he might have been made the scape-goat if he were out of reach, yet, in his present situation, I am sure the noble lord would not defend his own life by loading this unfortunate youth; much less would he attempt such a kind of defence, contrary to truth; for so it must be if either the prisoner himself or our evidence is believed.

“Would he call witnesses to prove the letters which have been read to be forged? Consider how they are authenticated. To some his signature still remains. He don't controvert its being like his hand. The bodies are
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written by Robert Frazer. A letter, unquestionably signed and sent by the noble lord to his royal highness the duke, was produced: the body is written by the same Robert Frazer. The signature to this, and the signature which remains to the others, appear manifestly of the same hand. One of the most material letters is an answer to a letter written by his son: that too must be a forgery; yet it was found in his own custody. But intrinsic evidence of authenticity is still stronger.

“ If the letters are forged, how come they to give some account of the association, and mention the same persons concerned as your lordships have heard from the general evidence ?

“ If the general evidence is a fiction, how could the same story get into these letters ?

“ If Robert Frazer invented the letters, how came Hugh Frazer and others to give the same account of the patent and commission which is to be found in them ? If the patent and commission never were seen nor heard of, how could they be put into forged letters ? But remarks are unnecessary, where the case is so plain. I have said thus much to shew, that the noble lord's alleging he wants assistance, or has not his witnesses, may be of more service to him than any assistance or witnesses he could have; and to shew, that the Commons have not taken upon themselves this prosecution to lay the noble lord at the bar under any disadvantages in his defence. From the witnesses which have been examined, the case must appear to your lordships such as no advantages could have enabled him to get the better of. There are many circumstances which induced them to single out this prosecution, many circumstances of a public, many of a peculiar nature. I am almost tempted to mention some of them; but in part they have occurred to your lordships in the course of the examination; and I refrain, lest I should drop any thing that might tend to inflame. Every thing of that sort has, by every body, been carefully avoided upon this occasion. That *Ciceronian eloquence*, as he calls it, from principles of justice and humanity, has not been used against him. Every gentleman who has spoke in this trial has made it a rule to himself, to urge nothing against the prisoner but plain facts and positive evidence, without aggravation. They have addressed themselves to your judgement, and not to your passions. I dare say, your lordships have observed that, though the evidence given consists of a variety of facts, some more directly affecting the noble lord, others less, and some perhaps not affecting him at all, neither in the summing up the evidence, nor in what I

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now trouble your lordships with, has any thing been mentioned as direct evidence against him which is not so. Circumstances which only tend to corroborate have been mentioned in that light; and evidence, which no way affects him, has not been repeated or observed upon at all.

“My lords, the whole is now before your lordships: it is your province to make the conclusion which ought to be drawn from the premises.”

Mr. Solicitor-general having finished; lord Talbot rose, saying,

“My lords, the abilities of the learned manager, who just now spoke, never appeared with greater splendor than at this very hour, when his candour and humanity has been joined to those great abilities which have already made him so conspicuous, that I hope one day to see him add lustre to the dignity of the first civil employment in this nation. My lords, I observe one thing in the defence of the noble lord at the bar, which, for the sake of the managers, for the representatives of Great Britain, and out of the regard that I have for their constituents who deputed them, I think myself obliged to take notice of.

“My lords, the noble lord at the bar in his defence complains, I believe very unjustly, of the hardships he has suffered in being deprived of his witnesses; and at the same time mentions, that there are witnesses of indisputable credit, who were brought up in order to be witnesses against him, but who have not been examined by the managers, for fear they should, on their cross examination, support those facts.

“My lords, I therefore now desire, for the honor of the gentlemen who are managers of this prosecution, that the noble lord at the bar may be asked, whether he is now willing to have those witnesses produced, and to have them asked any questions concerning that matter?”

Mr. Attorney-general. “My lords, what has been taken notice of by the noble lord, and what is desired by him, is extremely irregular, after the managers have closed and summed up their evidence, and the noble prisoner had liberty and time given him, in the most indulgent manner, to make his defence in such way as he should be advised. He was pleased to make a speech to your lordships, containing a great variety of facts; but declined producing any witnesses, and, though called upon for that purpose, thought proper to acquaint your lordships, that he should offer none to support those facts which he had alleged: your lordships have, upon that declaration, been pleased to proceed to hear the managers reply.

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“ My learned friend on my left hand hath executed that part with great justice to the commands of the commons, and all that tendernefs to the noble prifoner which was confiftent with his duty. *Your lordships have heard and felt the weight of it.*”

Mr. Attorney-general proceeded with great ability, and at confiderable length, to oppofe the admiffion of witneffes for the purpofe fpecified by the noble prifoner after the managers had clofed and fummed up their evidence; yet, in a point of fo great importance, Mr. Solicitor-general deemed it to be his indifpenfible duty thus to addrefs the lords:

“ My Lords,

“ The matter now agitated is of the utmoft confequence, not only to the prefent but to all future proceedings of this kind; and I doubt whether it is yet thoroughly underftood in its full extent.

“ The witneffes, the noble lord now propofes to call, are not to his defence, or in fupport of his innocence.

“ If they were, how irregular foever it may be to offer them now, in my opinion, and I dare fay the other managers are of the fame, I fhould be for confenting to their being called. We fhould never contend, though in ftrictnefs I might, that any evidence of this kind came too late to be heard.

“ But the defign of calling them, as now opened, is to fhew, that, from fome obftruction given to the bringing up his witneffes, his trial ought to be put off to an indefinite time; and that he may have new orders to fummon and compel witneffes to come from Scotland. This we oppofe, becaufe the application intended to be fupported by it cannot now be made.

“ The fpeech made by my lord confifted of two parts: firft, a defire to put off his trial indefinitely; and, if your lordships fhould not think fit to comply with his defire, then he refted his defence upon obfervations and objections to the force and credibility of that evidence which had been offered to prove his accufation.

“ In this he was very proper; for, though a perfon accufed calls no witneffes, yet, if the charge againft him is not clearly made out by legal and credible evidence, he ought to be acquitted.

“ Being asked, whether he had any witneffes to call, he declared he had none.

“ Had he desired to take your lordships opinion whether the trial should not stay till he could send to Scotland for witnesses, we should have opposed it. Your lordships calling to the managers to proceed was a determination, that you would not deliberate about staying the trial.

“ I own freely to your lordships, the reason why I did not take particular notice of the noble lord's complaint was, because I understood it to be meant as an artifice to palliate his not going into any evidence: and I did not think it necessary, I did not care, to endeavour to wipe off from his apology any varnish of this kind with which he thought fit to colour it. One thing, had I thought of it, I would have taken notice of: he was pleased to say, that several witnesses, brought up in support of the prosecution, were not called by the managers, because they would have proved the hardships he complains of. I can assure your lordships, and every other gentleman of the committee will join in what I say, no one witness was left unexamined for that reason. It is true, more persons were brought up to be witnesses than we called; but the reason of not calling them was, either because we thought what they had to say not material enough, or else because they were liable to an objection the noble lord had not made; which, whether well or ill founded, we did not care to give your lordships the trouble of disputing.

“ In consequence of what fell from your lordships, we told the noble lord in the course of the trial, that any witness examined by us should attend to be examined by him, if he desired it, and would give notice: we should have done the same with regard to any person brought up as a witness, though not examined.

“ As to this whole matter of complaint, the managers are entire strangers to it. Nothing of this kind has been done with their privity or knowledge.

“ And this brings me to the point, whether witnesses shall now be heard at this time to prove any such ground for putting off the trial *sine die*.

“ We oppose it, because, true or false, the trial cannot now be put off; and it would be a most dangerous precedent to go into an *ex parte* examination of such collateral matters. Hearing the evidence supposes your lordships can do something in consequence of it: if you cannot, it would be irregular and improper to go into it.

“ Before your lordships appoint the time of trial, you take into consideration the nature of the charge, and the place where the facts arise, in order to allow a reasonable time for preparation, and bringing witnesses.

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“Your lordships did so in the present case; and, after weighing all circumstances, you appointed the 23d of February.

“If, through any accident, the time fixed is too short, your lordships are always open to applications which must be supported by evidence to shew the delay is not affected; that all due diligence has been used; and that the witnesses are material, and expected to come within a certain time.

“Upon the application of the noble lord, your lordships deferred this trial to the 5th of March.

“Upon another application by him, you deferred it to the 9th of March, the day named in his petition.

“If he had any ground sufficient for deferring the trial longer, he should have applied to your lordships before it began; but, upon the ground now mentioned, it could not have been deferred, even in that way, because it is plain this matter, whatever there be in it, was within his knowledge at the time of the other applications. Hugh Frazer, his agent, who went down, as his lordship says, to bring up his witnesses, made an affidavit, annexed to a petition presented by his lordship on the 2d of March for putting off the trial; and was called in and examined at your lordships’ bar.

“There was likewise an affidavit annexed to his lordship’s petition presented on the 3d of March, and not a syllable of this complaint ever suggested; which shews that they thought no stress could be laid upon it, and that it was not to be supported. In the course of the trial hitherto, your lordships have heard nothing of it; on the contrary, you have heard of his witnesses, and what they were to prove.

“There is no precedent of putting off a trial indefinitely after the evidence for the prosecution is closed; I dare say there never will be such a precedent. At soonest this trial could not come on again before the next session of parliament.

“We oppose the attempting to prove a matter upon which your lordships cannot now do any thing; but I desire it may be understood, that we do not oppose, though it be at an improper time, the calling any witnesses upon the merits of his defence, either to disprove the evidence against him, or to assert his own innocence.”

The encomiastic style in which not only lord Talbot, but also his majesty’s attorney-general, delivered their sentiments to the house, as well of the great abilities as of the great tenderness
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of Mr. Solicitor-general to the prisoner, so far as was consistent with his line of duty to the state and to the public, will, it is to be hoped, be accepted as a proper apology for the introduction of these celebrated speeches, as part of the history of the life of the earl of Mansfield.

On the last day of the trial, the lord high steward, having previously acquainted the prisoner that his peers had found him guilty of the high treason whereof he stood impeached, now asked what his lordship had to say, why judgement of death should not pass upon him according to law?

Lord Lovat, in his turn, commenced his defence with a panegyrick on the Solicitor-general.

“ My Lords,

“ I am very sorry I gave your lordships so much trouble in my trial; and I give you a million of thanks for your being so good in your patience and attendance while it lasted. I thought myself very much loaded by one Murray, who, your lordships know, was the bitterest evidence there was against me. I have since suffered by another Mr. Murray, who, I must say with pleasure, is an honor to his country, and whose eloquence and learning is much beyond what is to be expressed by an ignorant man like me. I heard him with pleasure, though it was against me. I have the honor to be his relation, though, perhaps, he neither knows it, nor values it. I wish that his being born in the North may not hinder him from the preferment that his merit and learning deserves. Till that gentleman spoke, your lordships were inclined to grant my earnest request, and allow me farther time to bring up witnesses to prove my innocence; but it seems that has been over-ruled. All now that I have to say is a little in vindication of my own character.”

This vindication proceeded to a great length; and lord Lovat himself, immediately before solemn sentence was passed, made the following curious, unexpected, and good-humoured observation on the speech. “ I beg your lordships’ pardon for the rude, long discourse I made to your lordships. I had great need
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of my cousin Murray's eloquence for half an hour, and then it would have been more agreeable."

In this trial, the king's solicitor-general seems to have been considered as the mirror of eloquence and sound judgement. When we impartially consider the acknowledged effect which his first speech had on the house; the concurrent testimony of applause which flowed from the law-lords; the impartial and well-timed approbation of his colleague Mr. Attorney-general Ryder; and lastly, though not least, the repeated encomiums of the prisoner at the bar, bestowed on Mr. Murray's eloquence; are not we well warranted in drawing this conclusion, that these concurrent eulogies equal, if they do not surpass, any tribute of applause, given to the fluent orators of *Greece* and *Rome* by their warmest panegyrists?

In consequence of the solicitor-general having, in his celebrated speech, taken notice that Mr. Frazer, the son of lord Lovat, was actually attainted and in confinement, and, from the notoriety of the fact, that he was *forced into the rebellion*; some of my readers may be anxious for the fate of that unhappy youth. The very favorable impressions, which the speeches of lord Coke and Mr. Murray made in his favor, lead to the pleasing hope that he would either be acquitted on the trial, or that a ray of royal mercy would beam on a case so peculiarly interesting. He afterwards had the honor and happiness to bear the king's commission, and every act of his future life tended to prove how forcibly and justly the tender feelings, the animated diction, and dignified eloquence of lord Coke, and of Mr. Solicitor-general, were employed in the generous praise-worthy act of saving one of the bravest of men! Ye who fought by his side, and were animated by his example, at the siege of *Louisburgh*, and in divers engagements in the *Western world*, ye best can proclaim his merits, his unshaken loyalty, his dauntless courage! But this is a private appeal. The proceedings of the British legislature, ever grateful and attentive to reward distinguished merit, preclude all farther feeble panegyric of
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the author of these sheets, by an act passed in the year 1774, intituled, "An Act to enable his Majesty to grant unto Major General Simon Frazer, the Lands and Estate of the late Simon Lord Lovat, upon certain Terms and Conditions." The preamble states, amongst other facts, that, in the year 1747, proof was brought before parliament of the means used to involve Simon Frazer, the eldest son of Simon lord Lovat, in the late unnatural rebellion, at a tender age; and the said Simon Frazer, ever since he was capable of acting for himself, had testified his loyalty to his majesty and the royal family, and proved the sense he entertained of the excellence of the happy constitution of this country, by declining to engage in the service of a foreign state, though destitute of any establishment here, and by dedicating himself to the service of his country at the beginning of the late war, upon which occasion he raised, in a very short time, a large body of men, and commanded a regiment composed of them, with which he served meritoriously during the course of it, and was the first who offered to set that example, which in its consequences proved advantageous to the state, by calling forth from the corner of the kingdom many thousand soldiers, whose efforts, to demonstrate their zeal and attachment to his majesty's royal person and government, contributed to the glory and success of that war; and that the said Simon Frazer had, in the course of his service, attained the rank of major-general in his majesty's army; and, since the peace, had been employed by his majesty's command in the service of a power whose alliance this country had always deemed important; by all which his case appeared to be peculiarly distinguished.

The enacting part enables his majesty, his heirs and successors, to give, grant, and dispose, unto major-general Simon Frazer, his heirs and assigns, all and every the lands, lordships, baronies, and other estates whatsoever, which became forfeited to his late majesty by the attainder of Simon lord Lovat, and which were annexed to the imperial crown of these realms, by an act

act of the 25th of his late majesty in the same manner, and as fully and extensively as the same and every part thereof were vested in his said late majesty by the attainder of Simon lord Lovat; and as the same and every part thereof were held, enjoyed, and possessed, by lord Lovat before his attainder, upon certain terms and conditions in the act specified.

Should it be seriously asked what coincidence or connection has the good or ill fortune of Mr. Frazer, or the very masterly speech of *lord Coke*, with the publication of the Life of Lord Mansfield, the author would beg permission to answer: They are interwoven with an important part of lord Mansfield's legal character, and naturally induce a little sober reflection. Great abilities, when they are adorned by temperance and uniformity of conduct, lead to fame, to honors, and to every thing that is praise-worthy. But is it not very humiliating to reflect, that the most shining and pre-eminent abilities, without being under the guidance of, and aided by, sound discretion, are transient, fleeting, dazzle for a time, and are soon extinguished, like the short-lived splendor of a comet? These reflections naturally arise from the inconsiderate life of that eloquent young nobleman lord Coke, who lived a few years only after the trial of lord Lovat, wherein he shone so conspicuously. Yet his inordinate love of company, and the rites of Bacchus, soon gained an ascendancy, and frequently kept him from his pillow till a late hour in the morning, insomuch that it was reported on the eve of the trial, that, in order to preserve him cool and collected, and to send him home at an earlier hour than was usual, a brother member of the house of commons was friendly enough to attend him, at a fashionable club, the whole of the evening. The very masterly and elegant speech, which lord Coke made the next morning, amply rewarded the friendly care; but, alas! his sudden return to intemperance ought to be admonitory even to the brightest genius.

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Not an alliance with lady *Mary Campbell*, daughter of *John*, duke of *Argyle*; not the fondness of the earl of *Leicester*, heightened by that of a *father* for his *only child*; not the doating affection of a tender mother (one of the five daughters of *Thomas*, earl of *Thanet*, emphatically called the good lord *Thanet*); not these tender ties, conjointly or separately, could wean him from the most unworthy indiscretions, and the most fatal intemperance. But let us cast a veil over his imperfections! Suffice it to add, that these insidious foes, by rapid progress, first invaded his *health*, his *happiness*, then impaired the *brilliancy of his mind*, and finally cut the *thread of life*, ere it had run half its length. He died in the 36th year of his age.

Felix quem faciunt aliena pericula cautum.

To manifest the promptitude of Mr. Murray in replying to arguments without premeditation, the author will beg leave to introduce the heads of his answer to a speech which he had just heard, in opposition to an address of thanks to the king for his speech.

“ Mr. Speaker,

“ The honorable gentleman was much in the right to begin by telling us, that he despaired of any success in the opposition he was to make to the address proposed; for it is so modest, and all the expressions so general, that no just exception can be found to any one of them, especially as every gentleman knows, that, in our future proceedings, we are not tied down by any words or expressions in our address upon this occasion; and as it is a custom, which I may now call immemorial, to make some compliment to our sovereign upon every article which he has been graciously pleased to mention to us in his speech from the throne, as such compliments have always been made or moved for the very first day of the session, they never were, nor, indeed, ever could be founded upon what is called parliamentary knowledge, nor can such knowledge ever be required or thought necessary: they are founded solely upon what his majesty has been pleased to communicate in his speech, the truth of every part of which is, for that time at least, taken for granted; and, if upon a proper enquiry, when

when we have all proper lights before us, and have from thence obtained a parliamentary knowledge; I say, if it should then appear that any measure has been misrepresented in his majesty's speech, we may, with absolute freedom, not only censure the measure, but censure and punish the ministers who advised such a misrepresentation.

“ After what I have premised, sir, I believe, it will be easy to answer the objections made by the honorable gentleman to any of the expressions proposed to be made use of in our address upon this occasion; but first I must observe, that, in stating those objections, the honorable gentleman gave me a good deal of pleasure, though, perhaps, he neither designed it, nor supposed he had done so; the whole tenor of his harangue was a sort of anti-oratory, for almost every word he said concluded, in my opinion, against what he, I believe, intended; which was a method of speaking so new to me, that I could not help being pleased with it. Now, sir, as to the late treaty of peace, I know as little of it as the honorable gentleman does; all that either of us knows of it, I believe, is from public newspapers; and, if the articles be such as have been related by them, I must say, that I think it a better and more honorable peace than could be expected by any one who considered the situation in which the affairs of Europe were at that time. For my part, sir, I am so far from thinking the peace a bad one, that I am surprized how the French came to offer or agree to such terms as they did. Gentlemen talk of our giving up the only conquest we have made during the war; let us consider what the enemy have given up. The French have given up all their wide-extended conquests in Flanders, they have given up near as much as cost us ten years of the most successful war we were ever engaged in to take from them. And the Spaniards, in consideration of the two small duchies of Parma and Placentia, have given up the large duchy of Savoy, and the important country of Nice. So that, from the concessions of the enemy, one would really be apt to imagine, that we had been every where victorious in the war, and that they were in the utmost danger of being undone.

“ Was it so, sir? Does not every gentleman know that it was not? We had for three years preceding met every year with a signal defeat, and every defeat was attended with the loss of whole countries and many fortified towns. This, as the honorable gentleman rightly judged, was not owing to any misconduct in our generals, or to any want of bravery in our troops; but solely to the superior number of the enemy's armies. How could this be

provided against by our ministers? Will any one say that this nation could, or ought to have furnished more troops than it did? But it will be said, our allies ought to have augmented their quotas: so they promised to do; and to these promises, which were never performed, our ministers trusted from year to year, till our allies the Dutch were brought upon the verge of destruction. Danger, sir, has always a very different effect upon the imagination of those that are near to it, from what it has upon the imagination of those at a distance. The former view it through the right, the latter through the wrong end of a telescope. Gentlemen who were sitting safely here in London, or at their seats in the country, may think the Dutch were in little or no danger; but, when we talk of the necessity of making peace, we must consider in what light the Dutch themselves viewed the danger they were in. Suppose (for, as I have no knowledge of the fact, I can only suppose) they thought the danger so great, as to threaten agreeing to a neutrality, if we did not accept of the terms then offered by France: if they had agreed to a neutrality, they must have withdrawn their troops from the allied army; in which case, even after the arrival of the Russians, our army would have been much inferior in number to that of France: and though I only suppose this, yet I must say that I think the supposition highly probable, for the Russians were then at such a distance, that they could not have joined our army before the month of July; and, considering how quickly the French had reduced all the towns in Flanders which they could invest, the little fortresses of Steenswaert, Roermont, and Venlo, together with Maestricht, might probably have been reduced before the arrival of the Russians; after which, the very being of that republic would have depended on the event of one battle, which is a risk no wise nation will ever choose to run, if it can by any means be avoided; and, as the French court could not but be sensible of this, we cannot too much admire his majesty's wisdom in bringing them to agree to such reasonable terms.

“But this danger, to which our allies the Dutch were exposed, was not the only danger, sir, that made a peace necessary for us. Surely, gentlemen have not forgot the situation in which our public credit was at that time, and the danger it was in, of being entirely blown up. Do we not remember, that all our public funds, except Bank and East-India, were greatly under par, and hardly any hopes of the whole money's being paid in upon the new subscription? From this situation I think I may with reason presume, that, if the peace had not been concluded at the very time it was, our public credit would

would have been entirely blown up ; and in that case we could not have supported the war to the end of that year, much less for ten or a dozen years longer, which we probably must have done, before we could have recovered from the enemy all that they had then conquered, even supposing the war had, from the moment the Russian troops arrived, taken a turn in our favor, and had continued successful to the end.

“ I think I may now conclude, sir, that the noble lord's motion contains nothing relating to the peace but what we may, from the knowledge we have of it, agree to, especially as that knowledge has been confirmed by what his majesty has said of it in his most gracious speech from the throne ; and as we cannot, by any thing we now say of it, be bound up from censuring both the treaty and treaty-makers, in case, upon a mature consideration, after it has been laid before us, we should think that it deserves such a censure. But I am sure nothing the honorable gentleman has yet been pleased to object to it can afford ground for such a censure. The points in dispute between Spain and us are points merely relating to commerce, which are never settled by a general treaty, but left to be adjusted afterwards by a particular treaty of commerce ; therefore this can be no objection against the treaty's being a definitive treaty ; and, if our allies have all acceded to it without reserve, surely we may say so without entering into any disquisition by what means they were brought to accede ; for all treaties of peace are founded upon the parties at war being respectively convinced that they can do no better. This was the case of the late treaty, and this it was that made France give up all her conquests, and Spain pass by the greatest part of her pretensions in Italy ; therefore I was surprized to hear the honorable gentleman say, that no jarring interests had been any other way adjusted than by compelling our allies to give up every thing our enemies could ask.

“ As to what the honorable gentleman was pleased to say against the next paragraph of the address proposed, it is rather criticising than arguing, sir. Surely we have no occasion for parliamentary knowledge to say, that the public expence has been reduced, when every gentleman knows that many whole regiments have been already disbanded, and many large men of war put out of commission ; and, as the peace was signed but last month, we may say that this reduction has been made with unusual dispatch ; for, whatever it is in this, it is not usual in other countries. His objection against the word *œconomy* is another objection of the same kind ; for though his majesty in his speech has not made use of that word, he can mean nothing else
by

by recommending to us the improvement of the public revenue, which may be effectuated several ways by the œconomy of our ministers. If there be any of our present taxes which cannot be duly raised by the laws now in being, it is our business and our duty to contrive and establish such new methods as may be effectual; and, if there be any of our taxes which cannot be raised without great expence, and any new tax could be thought of, which would produce as much, and could be raised at a much less expence, it would be œconomy in us to abolish the old, and establish the new in its room; or if, by one method of raising money for the public service, we must pay a premium as well as interest for the money wanted, and another method could be contrived by which we might raise the money wanted at the same interest without any premium, would it not be œconomy in us to choose the latter rather than the former? The word œconomy may therefore be applied to our conduct in raising, as well as to the conduct of the administration in disposing, of the public money; and, if the honorable gentleman thinks it necessary, I am persuaded, our present ministers will not be against our enquiring, at a proper season, into the business as well as salaries of all the officers concerned in collecting or managing the public revenue.

“ I was glad to find, sir, that the honorable gentleman, in the humour he seemed to be in, agreed to our acknowledging the bravery of our troops; but I must desire gentlemen to consider, if what he proposes to add to this acknowledgement would not look something like a remonstrance, and consequently would be very improper to be made a part of our address upon this occasion; for, if it should be thought necessary to enquire into the causes which made the events of the war no way answerable to the bravery of our troops, that enquiry may hereafter be set on foot whenever we please, though nothing be said of it in our present address.

“ As to what the honorable gentleman proposes, sir, with regard to the last paragraph of the address moved for, I believe, upon consideration, it will appear that he is not more lucky in his subtractions than in his additions. Was not the destruction of the enemy's commerce of great consequence to this nation in particular, as well as to the war in general? Was not the protection of our own commerce, by destroying the enemy's privateers, of great consequence? In both these have we not had great success during the whole course of the war? Can it be any objection to our acknowledging this, that now and then a single ship, or a fleet of ships, escaped us in such a wide
ocean

ocean as that betwixt Europe and America? Was not the reduction of the island of Cape Breton, which was properly a naval expedition, a piece of signal success? Had not we signal success at Porto-Bello and Chagre? Even at Carthagena we had signal success, so far as related to the naval part. And though we had not all the success that might have been expected at Toulon, and upon some other occasions, he cannot deny our having had signal success at sea through the whole course of the war: the enemy were so sensible of it, that I am convinced it was what forced them to agree to reasonable terms of peace, notwithstanding their signal success upon the continent of Europe.

“To leave out these words would therefore, in my opinion, sir, be a neglect of what we owe to Providence, as well as to his majesty; and as to the other words proposed to be left out, the honorable gentleman certainly forgot, or did not attend to, the words in his majesty’s speech, to which these words relate, otherwise he would not have made any objection to them. His majesty, in his speech, desires us only to grant such supplies as may be requisite for the current service, for our own security, and for making good such engagements as have been already entered into, and laid before us; therefore, what is proposed in our address, by making good the nation’s engagements, can relate to none but such as have been laid before us, and of such we may properly enough be said to have a parliamentary knowledge: we not only know them, but we have approved of them, and consequently could not refuse to make them good, though these words were entirely left out of the address.

“I hope, sir, I have now sufficiently answered every objection made by the honorable gentleman against what my noble friend has been pleased to propose to us; but, before I sit down, I must observe, that it might be attended with very pernicious consequences, should we be less full, or less dutiful, in our acknowledgements to his majesty upon this occasion, than upon any former. We have still several points relating to our commerce and plantations to settle with France as well as Spain; points which could not be, and indeed never are, settled in a general treaty of peace; and yet points which are of the utmost consequence to this nation. How shall we obtain satisfaction as to any of those points? No one, I hope, expects that we can obtain it by favor, which is a motive that is never of any weight in negotiations between independent nations. In all such, fear or national interest are the only two motives of a public nature that prevail. But it is the national interest

interest of France, and of Spain too during her union with France, neither to give us satisfaction, nor to do us justice. Fear then must be made to operate upon both: our ministers must threaten to renew the war, if they refuse to settle those points to our satisfaction. Can such threatenings have any effect, if they suppose that there is like to be a disunion between his majesty and his parliament? And, if we should be less full or less dutiful in our acknowledgement to his majesty than has been useful of late years, would not both the courts of France and Spain have good ground for such a supposition?

“This consideration will, I hope, sir, induce even the honorable gentleman himself to give up the critical remarks he has made upon the address proposed; for that they will have any weight with others, I do not in the least fear; but I should wish to see our address upon this important occasion unanimously agreed to, especially as what is now proposed is neither of a greater length, nor more particular, than what has been used for many years.”

A fair occasion offered, about this period of time, for Mr. Murray to manifest his love of his profession, and an ardent desire to lay a better foundation in one of our universities for initiating and training students in legal knowledge by the fostering hand of an able *law-professor*. The first duke of Newcastle was the warm friend and patron of Mr. Murray. The civil law professorship in the university of Oxford being then vacant, Mr. Murray took the liberty of expostulating with his grace, who was then chancellor of the university of Cambridge, on the appointment of a successor; and lamented that at Oxford the civil law-lectures, and the opportunities of gaining legal knowledge by that channel, were, when contrasted with those of the *sister university*, in the most degraded and unworthy situation. He then expressed an anxious wish, that an able professor of civil law might be sought for and invited to fill the vacant seat. Dr. Jenner was the person thought of by the duke of Newcastle; yet he paid Mr. Murray the compliment of asking him, if he could recommend any gentleman who would fill it with greater ability. Antecedent to the establishment of the Vinerian professorship, the late Mr.

Justice

Justice Blackstone, who was then at the bar, and had given proofs that he possessed those qualifications which early pointed him out as *the most worthy* to be promoted on this occasion, was by Mr. Murray introduced and warmly recommended to the duke of Newcastle, who considered it as part of his duty to probe a little the political principles of the new candidate, by addressing Mr. Blackstone, "Sir, I can rely on your friend Mr. Murray's judgement as to our giving law-lectures in a good style, so as to benefit the students; and I dare say, that I may safely rely on you, whenever any thing in the political hemisphere is agitated in that university, you will, sir, exert yourself in our behalf." The answer was, "Your grace may be assured that I will discharge my duty in giving law-lectures to the best of my poor abilities." "Aye! aye!" replied his grace hastily, and your duty in the other branch too." Unfortunately for the new candidate, he only bowed assent; and a few days afterwards he had the mortification to hear that Dr. Jenner was appointed the civil-law professor. Nothing less than the love of science could, under these circumstances, have induced Mr. Murray and some other friends of Mr. Blackstone strongly to recommend and persuade him to sit down at Oxford, and to read law-lectures to such students as were disposed to attend him. The plan was not only attended with profit and pleasure in the first instance, but soon afterwards happily suggested the idea to the mind of Mr. *Viner* to establish a real law-professorship in the university of Oxford; and who so proper to fill it with eclat, and add lustre to the Institution, as Mr. Blackstone, whose Commentaries on the Laws of England, on their first appearance in the world, drew this high tribute of respect and approbation from lord Mansfield? On a brother-peer's having asked him, as a friend, what books he would advise his son to read, who was determined to be a lawyer, the chief justice replied, "My good lord, till of late I could never, with any satisfaction to myself, answer that question; but, since the publication of Mr. Blackstone's Commentaries, I can never

be at a loss. *There* your son will find analytical reasoning diffused in a pleasing and perspicuous style. *There* he may imbibe imperceptibly the first principles on which our excellent laws are founded, and *THERE* he may become acquainted with an uncouth crabbed author, *Coke upon Littleton*, who has disappointed and disheartened many a *Tyro*, but who cannot fail to please in a modern dress."

On the 11th of December, 1747, a bill was ordered to be brought into parliament, to prevent the insurance of French ships and their lading during the war with France. Mr. Nugent opened the debate so as to leave no doubt on the minds of his hearers of his great zeal to promote the bill; yet neither his ingenuity in placing the prevalent practice of those insurances to the account of self-interest on the one hand, nor his high tones in classing them under the head of high-treason in law as well as *in foro conscientiae* on the other, were sufficient to prevent Mr. Murray and Mr. Ryder, afterwards Sir Dudley Ryder, from discharging their duty to their country in speaking against the bill.

The speech of the former seems to be worthy of a place in this work, from the circumstance of its giving a very early presage, as well of the extensive knowledge of the speaker, as of his laudable attention to the interests of commerce in general, and to the preservation of that branch of it relating to insurance, which he adopted thus early in life, and which under his fostering hand, culture, and protection, has long flourished and become a valuable branch of British commerce.

"Mr. Speaker,

"Although I have very little hopes of succeeding in an opposition to what the honorable gentleman has proposed, yet, as I have the honor of a seat in this assembly, I think the duty I owe to my country obliges me to give my sentiments openly and freely upon the subject, because I see we are about to do what we have before often done upon the like occasions; we are going to make a regulation under popular pretences, which, in my opinion, will ruin a very beneficial branch of trade we are now in possession of, I may say, without

without a rival, and will transfer it to our greatest rival and most dangerous enemy. This, I say, sir, we have often done before; of which I could give a multitude of instances, but shall mention only a few, in order to shew how cautious we ought to be of making any new regulations or prohibitions with respect to trade, however plausible the pretences may be that are offered for inducing our approbation.

“ In the reign of Charles II. our landed gentlemen, especially those in the West, found that the produce of their estates, such as cattle, sheep, swine, butter, and cheese, was very much lowered in its price by the importation of such commodities, especially from Ireland. Though it is the general interest of every country, where there is any trade or manufacture, to have the price of those commodities as cheap as possible, because it lessens the price of labour, and consequently enables them to undersell their rivals at every foreign market; yet the imaginary private interest of our landed gentlemen prevailed, in spite of the court, over the general interest of the country, and a law was made for prohibiting the importation of all such commodities. I say, sir, the imaginary interest of the landed gentlemen; for it is certainly their real interest to encourage by all possible means the trade, manufactures, and commerce, of their country; but this is a future distant interest, which strikes very few men so strongly as that which is present; and therefore the present imaginary interest then prevailed over that which was real, but future. What was the consequence? As to the black cattle and swine, the Irish being thus prevented from importing them into England, where formerly they were fattened up and killed, the breeders of such cattle and swine were forced to fatten them up themselves, to salt what they could not find vent for at home, and to sell their salt beef and pork, as well as their butter and cheese, to the French, who were then just beginning to set up manufactories, and to plant their sugar colonies, neither of which they could so easily or so soon have done, had they not been supplied with these provisions from Ireland.

“ This was, sir, the fatal consequence of our wise regulation with respect to Irish black cattle, swine, butter, and cheese; but, with respect to sheep, the consequence was still more fatal: for, the Irish being prevented from bringing their sheep to England, and being unable to make any thing of them when killed at home, or to send them dead or alive to any foreign market, they kept them running in their sheep-walks, and increasing in number every year, merely for the sake of the wool, by which that com-

modity was rendered much cheaper in Ireland than it was in England, which produced two consequences fatal to our trade and manufactures; for, first, by the cheapness of wool in Ireland, great quantities of it were stolen away to France, notwithstanding the utmost we could do to prevent it, and sold there as cheap as the same commodity could be sold in England, which laid the first and chief foundation of all their woollen manufactures; and, 2dly, by the cheapness of wool in Ireland the people there were enabled to set up woollen manufactures of their own, which soon came to vie with those of England; so that our merchants found themselves rivalled and underfold at all foreign markets by the Irish, which led us into the committing of another most egregious solecism in our politics with regard to our trade.

“As I have said, sir, the merchants, who exported our woollen manufactures, soon found themselves rivalled and underfold at most foreign markets by the Irish: this obliged them to endeavour to beat down the price of our manufactures here at home; and the reason they assigned for so doing was their being underfold by the Irish abroad, which of course raised a popular clamour against allowing the Irish to export any woollen manufactures. As every set of tradesmen, and indeed every particular tradesman, would be glad to have a monopoly in what he deals in, it was no way surprising to hear such a clamour raised among our manufacturers and unthinking people here at home; and if we could by a law prevent every nation in the world from carrying on any woollen manufactures, I shall grant, that it would have been right to have prohibited the exportation of woollen manufactures from Ireland: but as we cannot by a law prevent other nations from being our rivals in this manufacture, as well as every other; as we can no way do this but by enabling our own people to work up and sell their manufactures cheaper than the same sort of manufactures can be worked up and sold in any other country, instead of prohibiting the exportation of any woollen manufactures from Ireland, we should have thought only on methods for rendering the materials and labour in England as cheap as they were in Ireland; and the first and most obvious method for this purpose was, to have repealed that law which prohibited the importation of so many of the necessaries of life from Ireland.

“But, sir, instead of this, the popular clamour prevailed, and in the year 1699 a law was passed for prohibiting the exportation of any woollen manufactures whatsoever out of Ireland to any place except England and Wales. Nay, even to England and Wales the exportation was laid under
such

such restrictions, as made it almost impossible for the Irish to sell any of their woollen manufactures, except in their own country; the consequence of which was of course, that many of their manufacturers, both masters and servants, were obliged to seek for employment in foreign countries, and most of them went to France, which established the woollen manufactures of that kingdom, and increased the clandestine exportation of wool from Ireland to France; so that in a little time the French made sufficient for their own consumption, and, by a new solecism in our politics, we soon opened for them a foreign market. But before I explain myself upon this head, I shall observe, that if we had, in the year 1699, repealed the law which prohibited the importation of Irish cattle, sheep, swine, butter, and cheese, it would have enabled the manufacturers in England to work up and sell their manufactures as cheap as the Irish, and both would have been sold so cheap at foreign markets, as would have generally increased the demand, which would have furnished employment enough for all the manufacturers both in Ireland and England, and would have rendered it impossible for the French to succeed in establishing a woollen manufacture of any kind, because the cheapness of our coarse woollen manufactures would have made them be run into France, and consumed there, in spite of all the measures their government could have taken to prevent it; and every one knows, that manufactories have in all countries been first set up by the coarser sort of manufactures; consequently, if we could have prevented the French from succeeding in any of the coarser sort, we should have prevented their being ever able to manufacture any of the finer sort, either for themselves or their neighbours.

Thus, sir, by endeavouring to keep up the price of our own manufactures, at the expence of our fellow-subjects in Ireland, we enabled our most dangerous enemies to succeed so far in setting up woollen manufactories, as to furnish themselves with what they wanted in that way; and, as I have said, we at last enabled them, by a new solecism in our politics with regard to trade, to become our rivals at foreign markets. What I mean, sir, is our declaration of war against Spain in 1702; for, though we had sufficient provocation at that time for declaring war against France, the new king of Spain, whom we had acknowledged but the year before, had given us no provocation to declare war against him; and a regard for our trade with Spain, which had been always before of great advantage to us, should have made us avoid being the first to declare war against that kingdom. Till that time,

time, Spain had always been the chief mart for our woollen manufactures ; but, by thus rashly declaring war against them, we shut up, in a great measure, that mart for the woollen manufactures of England, and opened it for those of France ; for, though we were then wise enough not to prohibit trade with Spain, notwithstanding the war we had declared, yet the war gave such an interruption to our commerce, and raised such an aversion among the Spaniards against us, that by degrees they were brought into the custom of wearing French instead of English manufactures.

“ I could mention many other instances, sir, where we have injured our own trade, and promoted that of our most inveterate enemy, by ill-judged regulations, or mistaken politics ; but these, I hope, will be sufficient for shewing gentlemen how cautious they ought to be, when any new regulation is proposed with respect to trade, especially a regulation which may perhaps strip us of the only branch of trade we now enjoy without a rival, and may very probably transfer it to our enemies the French. I say, sir, a branch of trade, which we now enjoy without a rival ; for, I believe, there is a great deal more of the insurance-business done now in England than in all Europe besides. Not only the nations we are in amity with, but even our enemies the French and Spaniards, transact most of their business of insurance here at London ; and I cannot think it any crime in our merchants to correspond with them on this head, no more than it was in our merchants to correspond about trade with the Spanish merchants during the whole time of the war in queen Anne’s reign. To carry on trade for the mutual benefit of both nations is not aiding and assisting the enemy, nor is it such a correspondence as was intended to be prohibited by his majesty’s declaration of war, especially when it is such a trade as must always leave a large balance in ready money here in England.

“ This balance, I shall grant, Sir, may appear to be but a trifle when compared with the expence we are at in supporting the war ; but, the greater that expence is, the more money we are obliged to send out yearly on that account ; surely, the more cautious we ought to be of parting with any branch of trade which certainly leaves a balance here : and, if we consider the great profits made by the insurer, the profits made by the broker or office-keeper, the profits made by the factor, and the profits made by our dealers in exchange, we cannot suppose this balance to be such a trifle as the honorable gentleman seems inclined to represent it. For my own part, I must suppose that it amounts to a very large sum annually, when I consider the vast sums yearly insured here upon French and Spanish bottoms, both
which

which I must take into the account, because I am of opinion that we shall lose both by this regulation.

“ Nevertheless, Sir, however great I may think this balance, however dangerous I may think the regulation proposed, I should readily agree to it, could I think it certain that the French merchants would find it impossible to meet with good insurers either at home or in any other part of Europe: but I am so far from thinking this certain, that I think the certainty lies on the other side. It is well known that there is not a more enterprising, adventurous people in Europe than the French naturally are, nor a people that have a greater itch for every thing that looks like gaming. Their having no public insurance-office, nor any number of private insurers in France, does not proceed from a want of rich men who would be ready and willing to undertake this business, but from the difficulty they find at present to get any employment in this way. The French merchants have been so long accustomed to our shop, and have always found themselves so honorably dealt with, that they will not apply to any other, and will rather choose to pay commission here, than trust to any office, or any private insurer, among themselves. Therefore, while we admit them to insure here, it will never be in the power even of the government of France to set up a public insurance-office, nor can any private man there meet with encouragement in this way of business. But I am convinced, that, as soon as they hear of this bill's being passed into a law, a public office of insurance will be erected at Paris, and multitudes of rich men there will undertake the business; because, after we have banished their merchants from our shop, they will apply to the shops set up in their own country, rather than to any foreign shop they have never been accustomed to.

What are we then to do by this regulation? Why, Sir, we are to strip ourselves of a most profitable branch of trade, and transfer it to the French, who could never have got hold of it, if it had not been for this our wise regulation. And this will be the effect, not only as to insurances upon French ships, but, in a very little time, as to the insurances upon all the ships of Spain and Portugal; for, as the correspondence between them and Paris is quicker, and more certain, than the correspondence between them and London, they will apply to the offices of insurance at Paris, as soon as these offices have come into a little credit; and, if a public office be set up there, with a large capital, their capital will procure them credit, as soon as the office is opened.

“ Having

“ Having thus, Sir, shewn how probable it is, that the French merchants will find an easy and secure access to insurance at home, the very moment we exclude them from it in England; I think, I have no occasion to take notice of the advantages we shall reap by the exclusion; for all those advantages are founded upon a supposition that it will be impossible for them to find so cheap and so secure an insurance at home as they now find in England, which is a supposition that, for the reasons I have mentioned, cannot, I think, with any reason, be supposed; and if this should turn out to be the case, as I am afraid it will, we shall strip ourselves of a branch of trade by which we now make a clear profit perhaps of several hundred thousand pounds yearly, and transfer it to our most dangerous rival; which is not, I am sure, a proper method for bringing the war to a happy and speedy conclusion.

“ Having mentioned the war, Sir, I must observe, that our success at sea this last summer makes it more unnecessary for us to think of such a regulation now, than it has been at any time since the war began; and, if Providence should favor us with the same success next summer, we shall have no occasion to prohibit insurances upon French ships; for it will raise the price of insurance so high, that no man, either in France or any where else, will think of sending goods by any such ship. Before a merchant sends out a cargo, he always first sits down and computes what profit he may probably make by the adventure out and home; and, if the insurance be so high that no profit he can expect will answer it, and something more for his own trouble, and the use of his money, he will certainly resolve to send out no cargo at all. Therefore, if, by the success of our squadrons and cruisers, we should be able to raise the price of insurance upon French ships to such a height that no trade could bear it, we shall much more effectually, and more safely, put an end to the French commerce, at least in their own ships, than we can do by this regulation; and, if they should fall upon any way to carry on their commerce in neutral bottoms, this regulation can no way affect it. This we should attempt; this, I am very sure, our ministers will do all that lies in their power to effectuate; and therefore, I think, we should suspend agreeing to any such dangerous regulation, till we have tried a little farther what can be done in this way.

“ Before I sit down, Sir, I must take notice of a suspicion, not a supposition, thrown out by the honorable gentleman, that some of our insurers have given intelligence to the French of the stations of our men of war and privateers,

privateers, in order to prevent the French ships on which they had insured coming in their way. For my own part, I never heard that any such thing was suspected; but, on the contrary, I have heard that some of the richest prizes taken in this war fell into our hands by intelligence communicated by those employed to get insurances upon them. To this I must add, that it is, in my opinion, impossible for our insurers to give intelligence of the stations either of our cruisers or privateers, because our cruisers never know their stations till they open their instructions at sea, being, as I have heard, directed first to sail to such a station, and there to open their new orders; and as to our privateers, their station is always left to the direction of the captain, who may change it as often as he will, and seldom goes out with any fixed design; or, if he does, he will, for his own sake, as well as for the sake of his owners, let no one into the secret.

“I must therefore be of opinion, Sir, that neither in this respect, nor any other, our insurers can do us any prejudice if they would; nor can they I think, give the French commerce any advantage, but such a one as the French merchants may meet with at home, the moment we exclude them from it here. How far the popular clamour without doors may prevail upon gentlemen within, I do not know; but, as I look upon the expedient proposed as a very dangerous one, and as an expedient that will certainly be attended with an advantage to the French trade, and a loss to our own; as I hope, and not without just grounds, that the advance of the premium will soon put an entire stop to all French insurances here or any where else, and consequently to all the French commerce in their own shipping, I must be against what is proposed; and, though I was sensible of its being at present a little unpopular to oppose such a proposition, I thought I was, in duty to my country, obliged to declare my sentiments openly and freely upon the subject.”

So early as in 1752, the mischiefs portrayed by Mr. Murray in this speech were asserted in the House of Commons to have actually taken place, *viz.* that regular offices of insurance were established at Paris, Calais, and Bourdeaux, to the great loss and disadvantage of this nation, since it had awakened the French ministry from their supineness and lethargy, and placed the duke de Penthièvre at the head of the insurance-companies at Paris and Bourdeaux.

The accumulation of honors, and the fair increase of fame which conspicuously marked the characters of Mr. Murray and two or three of his contemporaries at Westminster, with whom he had associated and formed an early friendship, were viewed by a provincial counsel with a jealous, and possibly with an envious eye, since *Envy will follow Merit like its shade*.

In 1751,

Mr. Fawcett, the late recorder of Newcastle upon Tyne, instead of contributing to the conviviality of the table, convened on a loyal occasion by the dean of Durham, who gave a dinner to the principal gentlemen in the neighbourhood on the king's birthday, gave a very unexpected and unpleasant turn to the conversation by introducing a very serious charge. Lord Melcombe having *de die in diem* committed the information he received of this very extraordinary proceeding into writing; the author of these sheets begs leave to introduce them in lord Melcombe's own words, extracted from his Diary :

“ Messieurs Murray, Fawcett, and Stone, were much acquainted, if not schoolfellows, in early life. Their fortune led them different ways : Fawcett's was to be a country lawyer and recorder of Newcastle. Johnson, now bishop of Gloucester, was one of their associates. On the day the king's birth-day was kept, they dined at the dean of Durham's, at Durham ; this Fawcett, lord Ravensworth, Major Davison, and one or two more, who retired after dinner into another room. The conversation turning upon the late bishop of Gloucester's preferment, it was asked, who was to have his prebend of Durham ? The dean said, that the last news from London was, that Dr. Johnson was to have it.” Fawcett said, “ he was glad that Johnson got off so well, for he remembered him a Jacobite several years ago, and that he used to be with a relation of his who was very disaffected, one Vernon, a mercer, where the pretender's health was frequently drank. This passing among a few familiar acquaintance was thought no more of that time : it spread, however, so much in the North (how I never heard accounted for), and reached town in such a manner, that Mr. Pelham thought it necessary to
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desire Mr. Vane, who was a friend to Fawcett, and who employed him in his business, to write to Fawcett, to know if he had said this of Johnson, and if he had, if it was true.

“ This letter was written on the 9th of January; it came to Newcastle the Friday following; Fawcett was much surprised, but the post going out in a few hours after its arrival, he immediately acknowledged the letter by a long, but not very explicit answer. This Friday happened to be the club-day of the neighbouring gentlemen at Newcastle.

“ As soon as lord Ravensworth, who was a patron and employer of Fawcett, came into the town, Fawcett acquainted him with the extraordinary letter he had received. He told him that he had already answered it, and being asked to shew the copy, said he kept none; but desired lord Ravensworth to recollect if he held such a conversation at the deanry of Durham the day appointed for the birth-day. Ravensworth recollected nothing at all of it: they went to the club together, and Ravensworth went the next morning to see his mother in the neighbourhood, with whom he stayed till Monday; but this thing, of such consequence, lying upon his thoughts, he returned by Newcastle. He and Fawcett had another conversation; and in endeavouring to refresh each other's memory about this dreadful delinquency of Johnson, Fawcett said he could not recollect positively at such a distance of time, whether Johnson drank those healths, or had been present at the drinking of them, but that Murray and Stone had done both several times. Ravensworth was excessively alarmed at this with relation to Stone, on account of his office about the prince; and thus the affair of Johnson was quite forgotten, and the episode became the principal part. There were many more conferences between Ravensworth and Fawcett upon this subject, in which the latter always persisted that Stone and Murray were present at the drinking, and did drink those healths. It may be observed here, that when he was examined upon oath he swore to the year 1731 or 1732 at latest. Fawcett comes up, as usual, upon his law business, and is examined by Messrs. Pelham and Vane, who never had heard of Mr. Murray or Stone being named. He is asked, and answers only with relation to Johnson, never mentioning either of the others; but the love of his country, his king, and posterity, burned so strongly in Ravensworth's bosom, that he could have no rest till he had discovered this enormity. Accordingly, when he came to town, he acquainted the ministry and almost all his great friends with it, and insisted upon the removal of Stone.

“The ministry would have slighted it, as it deserved; but, as he persisted, and had told so many of it, they could not help laying it before the king, who, though he himself slighted it, was advised to examine it, which examination produced this most injudicious proceeding in parliament.”

Such is lord Melcombe's account; and the same author informs us, that Mr. Murray, when he heard of the committee being appointed to examine this idle affair, sent a message to the king, humbly to acquaint him, that, if he should be called before such a tribunal on so scandalous and injurious an account, he would resign his office, and would refuse to answer. It came, however, before the House of Lords, January 22, 1753, on the motion of the duke of Bedford.

“The debate was long and heavy, says lord Melcombe, and the duke of Bedford's performance moderate enough. He divided the house, but it was not told; for there went below the bar with him the earl Harcourt, lord Townshend, the bishop of Worcester, and lord Talbot only. The bishop of Norwich and lord Harcourt both spoke, not to much purpose; but neither of them in the least supported the duke's question. Upon the whole,” lord Melcombe concludes, “it was the worst judged, the worst executed, and the worst supported point, that I ever saw, of so much expectation.”

The Muses were invoked, as well as lord Melcombe, to record this singular transaction. Whether the Aonian Maids have conferred any favors on another infant votary on this occasion is not for the author of these sheets to determine, who can vouch for the authenticity of the few lines on a *supposed crime*, which his late majesty king George the Second viewed in its true light. “Whatever they were,” his late majesty is reported to have said, “when they were Westminster boys, they are now my very good friends.” Shall the doors of royal mercy be open to *all* with this curious exception — except the indiscretions of inconsiderate youth?

To probe thy crimes, disloyal FIEND,
See council of the state conven'd;

"My lords," (an age-wise peer addrest,)
 "These crimes convulse my loyal breast!"
 No woman in adultery caught,
 Rise, Mitred-head! with treason fraught!
 "Ere manhood's down," accusers say,
 "Had grac'd his chin, ere taught to pray,
 He drank, devoid of all detection,
 Disloyal healths with genu-flection."
 From regions cold to milder skies
 Fame on her dew-bright pinion flies,
 Reveals the secret, stoops to pry,
 Bids MERCURY to state guardians fly,
 Sends DISCORD, with her hideous mouth,
 T' inflame the regions of the South,
 While ENVY rears Sedition's crest,
 In Fawcett's form, by demons drest.
 A Sylph here whisper'd, "Demon fly,
 Law had a finger in the pie!
 With Ciceronian eloquence,
 Prepar'd to plead his own defence,
 Murray, all-graceful, hurl'd defiance
 At Fawcett and his Grand Alliance*.
 Then silence broke: "Most Noble Præses,
 Call for the *treason*—no—the *thefts*
 Of college-youths from Alma Mater,
 Who steal, with pious wish to cater
 Viands and wine. Alert who think
 HEBE will grace the healths they drink;
 ROME might our juv'nile thoughts engage,
 But ALBION our maturer age.
 Come, DORSET, come, with all thy worth,
 If embryo treason e'er had birth,

* "Grand alliance."—Lord Ravensworth, the patron and warm friend of Mr. Fawcett, formed an alliance in the coal-trade with the late Mr. Bowes, and others, which gained the appellation of the *grand alliance*.

E'er flow'd in deep polluted tide
 Within these veins—shall Dorset hide
 The foul contagion? No.—Reveal
 Truth, naked truth, who best can tell.
 O Portland! would thy loyal line,
 The bramble with the myrtle twine,
 A traitor in a Murray find,
 To polish and improve the mind,
 To trace the springs, unlock the store,
 Of antient * and of modern lore?
 As soon might *Fred'ric's* ROYAL SIRE
 Around the Nation's hope plant *treason* dire!
 The tree best by its fruit is known,
 Thus judge of Johnson, Murray, Stone!
 Like a firm phalanx, lo! we rise,
 Whose conscious innocence defies
 The shafts of malice, poison'd dart
 Of Envy aim'd at feeling heart.
 Let our accuser, face to face,
 The latent seeds of treason trace,
 Before this great tribunal stand,
 And with our crimes stain Albion's land."
 Fawcett look'd pensive, heav'd a groan,
 But no man dar'd to throw a *Stone*!

The speech of his majesty's solicitor-general on this trying occasion, wherein he appealed to the dukes of Dorset and Portland in particular, and to the lords in general who were then present in council, to bear testimony to his principles, to his unshaken loyalty, and the love of his sovereign, is deemed to be one of the finest compositions in the English language.

* "Of antient and of modern lore"—alludes to the two letters in this collection, which were written by Mr. Murray, when he was a young man, for the use of the duke of Portland. See pp. 12, 17.

In the elegant and valuable repository of a very learned and dignified friend of lord Mansfield, a single copy of this invaluable speech is supposed to be safely deposited; and it is devoutly to be wished, that so great a hidden treasure may not be for ever buried in oblivion.

Bishop Johnson took another method of defence. Conscious that Fawcett had exceeded the bounds of decency, and the plain path of rectitude, by implicating him in the charge, the prelate went to Fawcett's chambers in the Temple, and desired an interview, but in vain. Dissatisfied with the answer, that Mr. Fawcett was not at home, his lordship renewed his visit very early the next morning, and the laundress, not being in the secret, confessed that her master was yet in his bed. The bishop determined to wait till he arose, and poor Fawcett left his thorny pillow with reluctance, for something sharper than thorns awaited him, an interview which he could not avoid; the result of which soon produced expressions of deep contrition, a perfect willingness on his part, either to read, or write, a recantation of his errors respecting the bishop, whose preferment (the reader will be pleased to recollect) was the primary and principal topic of the table conversation. The latter mode was adopted, and the following declaration, transcribed from the original letter, now in my possession, was made:

“ My Lord,

London, 29th January, 1753.

“ I take the liberty of giving you the trouble of this letter, in order to wipe off any reflections which may have been to your lordship's prejudice, from a misconstruction or misrepresentation of any thing said by me at the dean of Durham's last summer. It is now, I believe, near twenty years since your lordship and I met at my relation's, and before that time I never had any acquaintance with your lordship; and it really surprizes me very much, that any inference from what I said of my relation's principles in politics should, by any one, be applied to your lordship. It is a very disagreeable thing to be giving an account of what has passed in any conversation; but it is my duty, in the most solemn manner, to declare, that I did
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not, and could not, say any thing which in the least could, or which was any way meant by me to charge your lordship with being the proposer of, or ever being present at, the drinking of any disloyal healths. I am very sorry for the trouble you have had about this affair, and am, with the greatest respect,

“ My lord,

“ Your lordship's most obedient humble servant,

“ CHR. FAWCETT.

“ Whatever has been construed as a surprize of mine at your lordship's preferment, I am sure it was meant by me as an intimation only, that your lordship was fortunate in having the preferments drop at the time they did.

“ *Lord Bishop of Gloucester.*”

In 1754,

Sir Dudley Ryder, his majesty's attorney-general, was advanced to the dignity of lord chief justice of the court of King's Bench; and on that occasion his majesty's solicitor-general, Mr. Murray, was promoted to fill the high station of the king's attorney-general. This promotion did not alienate him from the honorable society of Lincoln's Inn, whose chief ornament he had many years been; but the interval was not long before he ceased to be a member of that society.

In 1756,

the death of lord chief justice Ryder gave rise to a second succession, and the king's attorney-general was appointed to that high office.

Previous to his taking his seat as lord chief justice, the usual ceremony of taking leave of *alma mater*, or the law-society of which he was a member, was to be respectfully observed. Whether the origin of this laudable custom is to be classed among those good old foster-fathers who have contributed to raise emulation in the students of the society, or whether it was designed to manifest the gratitude of the latter, for the honor which every high

high character confers on the society. Whatever laudable motive introduced the ceremony, no man of sensibility could be present in Lincoln's Inn Hall, when the honorable Mr. Yorke, on whom devolved the honor of making the complimentary speech to the new lord chief justice, and of presenting him with a votive offering of a purse of gold, in the name of the society, without being forcibly struck with the favorable impression, that he was the worthy *son* of the great lord *Hardwicke*. A fair occasion this for Mr. Murray to retaliate, who elegantly admitted and avowed, that *Laudatus à laudato viro* made unmerited praise itself pleasing. The substance of this elegant reply, delivered with the greatest grace, ease, and perspicuity, was :

“ I am too sensible, Sir, of my being undeserving of the praises which you have so elegantly bestowed upon me, to suffer commendations so delicate as yours, to insinuate themselves into my mind ; but I have pleasure in that kind partiality which is the occasion of them : to deserve such praises is a worthy object of ambition ; and from such a tongue flattery itself is pleasing.

“ If I have had in any measure success in my profession, it is owing to the great man, who has presided in our highest courts of judicature the whole time I attended the bar. It was impossible to attend him, to sit under him every day, without catching some beams from his light. [In this place he enumerated lord Hardwicke's particular excellences, and then went on.] The disciples of Socrates, whom I will take the liberty to call the great lawyer of antiquity, since the first principles of all law are derived from his philosophy, owe their reputation to your * having been the reporter of the sayings of their master. If we can arrogate nothing to ourselves, we may boast the school we were brought up in ; the scholar may glory in his master, and we may challenge past ages to shew us his equal.

“ My lord *Bacon* had the same extent of thought, and the same strength of language and expression ; but his life had a stain.

“ My lord *Clarendon* had the same abilities, and the same zeal for the constitution of his country ; but the civil war prevented his laying *deep* the foundations of law ; and the avocations of politics interrupted the business of the chancellor.

* Mr. Charles Yorke.

“ My lord *Somers* came the nearest to his character ; but his time was short, and envy and faction sullied the lustre of his glory.

“ It is the peculiar felicity of the great man I am speaking of, to have presided very near twenty years, and to have shone with a splendor that has risen superior to faction, and that has subdued envy.

“ I did not intend to have said, I should not have said so much upon this occasion, but that, in this situation, with all that hear me, what I say must carry the weight of testimony rather than appear the voice of panegyric.

“ For you, Sir, you have given great pledges to your country ; and, large as the expectations of the public are concerning you, I dare say you will answer them.

“ For the society, I shall always think myself honored by every mark of their esteem, affection, and friendship ; and shall desire the continuance of it no longer than while I remain zealous for the constitution of this country, and a friend to the interests of virtue.”

On this pleasing occasion the author of these sheets had the honor to be present (several of his friends who were also present are yet in existence) ; and can bear ample testimony to the tribute of applause, to the general joy, and the marked approbation of the audience. He was also present on a similar occasion, when Sir John Willes took leave of the society, on his being appointed lord chief justice of the court of Common Pleas in 1753, who, in a few words, wittily said a great deal to the purpose. He politely thanked Mr. Attorney-general for all the fine encomiums he had bestowed on one who very little merited them, but who begged permission to conclude with a very honest *declaration* of the *highest authority*, “ The lot is fallen unto me in a fair ground, yea I have a goodly heritage.”

CHAPTER THE SECOND.

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CHAPTER II.

The honorable Mr. MURRAY, his majesty's attorney-general, was, on the 8th of November, 1756, called to the degree of serjeant, and about eight in the evening was sworn in lord chief justice of the court of King's Bench, in the room of the late lord chief justice Sir Dudley Ryder, who died on the 25th of May, 1756, before the lord chancellor, the earl of Hardwicke, at his house in Great Ormond Street, in the presence of the three judges, and most of the officers of the court of King's Bench.

His lordship took the oaths of allegiance and supremacy on his knee, and the oath of office standing. Immediately afterwards the great seal was put to a patent, which had before passed all the proper offices, creating his lordship Baron of Mansfield in the county of Nottingham, to him and the heirs male of his body.

Thursday, November 11, 1756, lord Mansfield took his place as lord chief justice.

Notwithstanding the new lord chief justice had been habituated to, and had long flourished in, a court of equity, where his Ciceronian eloquence first distinguished him, established his fame, and acquired the appellation of a bright ornament of that court, at a period when the eloquence of the Chancery bar shone in great purity and perfection under the auspices and the benign influence of lord chancellor Hardwicke; yet no sooner was lord Mansfield called to preside in the first law court in this kingdom than

than in a dry and trivial cause, an action of debt *, for a penalty of forty shillings for every month, incurred by 5 Eliz. cap. 4. sect. 31. for exercising the trade of a brewer, without having served an apprenticeship, the sound judgement of the new chief justice, and his clear comprehension of all the circumstances of a case, unimportant at the first blush, but the very reverse when viewed in its proper light in a great commercial country; these irresistibly made a most favorable impression on the bar, on the audience,

* Among many cogent reasons assigned by the chief justice as the ground of his opinion, that Mr. Chace, the defendant, was not liable to the penalty in the act, the few following outlines are selected:

“In many considerable undertakings it is absolutely necessary to take in persons as partners † to share the profits, and risk the loss; and the general usage and practice of mankind ought to have weight in determinations of this sort, affecting trade and commerce, and the manner of carrying them on.

“It is notorious, that many partnerships are entered into upon the foundation of one partner contributing industry and skill, as in this case, and the other money.

“Many great breweries and other trades have been carried on for the benefit of infants and residuary legatees, under the direction of the *Court of Chancery*.

“Now if the plaintiff's construction was to hold, the whole direction and decree of the Court of Chancery was contrary to *law* and to an express act of parliament.

“It would introduce the utmost confusion in affairs of trade and commerce if this construction should prevail. On the other hand I see no inconvenience. It is exactly the same thing as to the trade in every iota, whether this partner has, or has not, served an apprenticeship; therefore, I think the defendant not liable to the penalty of 5 Elizabeth.”

In this judgement all the other judges concurred. Mr. Justice Foster, in expressing his opinion, said, “He had prepared himself to give his reasons at large; but, as the lord chief justice had gone through them so fully, and enforced them in so clear and satisfactory a manner, he would only in general declare his concurrence.”

Again. In relation to a brew-house on the case of Wright, on the demise of Green against Proctor, lord Mansfield observed, “Green was to be a gentleman in this affair, Ekins to furnish skill and money, Proctor to contribute labor and attendance.” Vid. 4 Burr. 2209.

† Vid. 1 Burr. p. 7.

and drew a sincere and handsome acknowledgement from that able judge, Mr. Justice Foster, then sitting on the bench.

In the same year, 1756, a case was sent out of Chancery to the court of King's Bench, Robinson and Robinson *, which is more worthy of notice, as it manifests the great contrariety of opinions on a question which has been long discussed, and much agitated in law.

Before lord Mansfield had been six months in the possession of the dignity of lord chief justice he was, on the 9th of April, 1757, appointed, *pro tempore*, chancellor of the Exchequer; and

* George Robinson, of Bochym in Cornwall, Esquire, made his will, and after giving his wife one guinea, and his father-in-law a groat, gave the greatest part of his real estates to Lancelot Hicks of Plymouth, in the county of Devon, Gentleman, for and during the time of his natural life, and *no longer*, provided that he alter his name and take that of Robinson, and live at his house at Bochym; and after his decease, *to such son* as he should have, lawfully to be begotten, taking the name of Robinson; and for default of such issue, then he bequeathed the same to his cousin, the defendant, William Robinson.

In April 1733, we find that, in another part of this case, on this very will, Sir Joseph Jekyll held Lancelot Hicks to be entitled to an estate *for his life*, remainder to his eldest and but one son for life, remainder to William Robinson, the devisee over.

In 1734 lord Talbot, on a re-hearing, was of the same opinion, yet the previous decree of a court of equity, confirmed on a re-hearing, did not prevent the unanimous certificate of the judges in the King's Bench in favor of an estate tail by implication, *viz.* "We are of opinion that, upon the true construction of the said will of the testator George Robinson, the said Lancelot Hicks must, *by necessary implication to effectuate the manifest general intent* of the said testator, be construed to take an estate in *tail male*, he, and the heirs of his body, taking the name of Robinson, notwithstanding the express estate devised to the said Lancelot Hicks for his life, and no longer."

This certificate was confirmed in Chancery, and a decree made accordingly.

On an appeal to the House of Lords from that decree, the opinion of all the judges was asked. It was delivered by lord chief baron Parker, with the reasons at large; and they unanimously agreed with the above certificate, *upon* the above grounds suggested thereby. Whereupon the decree was affirmed by the lords, on the 14th of February, 1758.

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in this office, principally through his mediation, the coalition between Mr. Fox, afterwards lord Holland, and Mr. Pitt, afterwards earl of Chatham, was brought about, the former having been made paymaster of the forces, and the latter principal secretary of state; a coalition which was of the most singular service to the country, by uniting all the great leaders of the different parties, and thereby giving an energy to the war we were then engaged in, and which terminated so gloriously and successfully to the British arms.

1757.

A dispute between two candidates respecting the right to a Southwell fellowship *, in this year, came in a very learned and questionable

* Masters and senior fellows of John's College, Cambridge, *versus* Todington, clerk.

After a long debate had been spent, principally in reading numerous Latin extracts from antient statutes of bishop Fisher, and several of queen Elizabeth's statutes having been introduced and read, on a suggestion by the counsel for the visitor, that although bishop Fisher, as surviving executor of Margaret countess of Richmond, gave statutes, yet he had no power to do so, and that therefore queen Elizabeth gave fresh statutes. The lord chief justice, not to disappoint public expectation, ordered that it should stand over till the next day, and added, "Let us have *copies of the material statutes* in the mean time."

In the second day's argument the solicitor-general, Mr. Yorke, and Mr. Norton, displayed great power, deep learning, and delivered their arguments with animation.

On the day following lord Mansfield observed, that, upon looking into the papers left with him, he found it necessary towards coming to a complete understanding either of the statutes or of the deed, "That the prior constitution of the college antecedent to both should be laid before the court," as both the deed, and also queen Elizabeth's statutes *expressly refer* to this *prior constitution* of the college, and consequently must be, in some measure, unintelligible and inexplicable, unless it be also known "what the *prior constitution was*." He proposed therefore, that the parties should, in the best manner they could, lay this constitution before the court, and that the case would be spoken to again in the next term, not by all the counsel arguing it over

questionable shape before the court of King's Bench, and inasmuch as the doctrine of the origin of the old colleges in both universities,

over again, but by only one counsel on each side, who should apply themselves to *such conclusions* as might arise from such prior constitution of the college, and be applicable to queen Elizabeth's statutes, or to the deed of covenants.

The case was accordingly adjourned till the next term; and the lord chief justice, by his repeated requisitions to the parties for additional papers and statutes, having made himself completely master of the subject, we find him in the next term engaged in disputing every inch of ground, which he deemed unnecessary to be trod over again, and in combating the strong efforts which were made to prevent a summary, and, as Mr. Norton strongly contended, a premature determination.

Mr. Solicitor-general having proposed to consider three distinct questions, *viz.*

I. Whether the bishop was not as extensive a visitor under the old constitution as under the new? II. Whether the college are not bound by the acceptance of the new statutes? On this head lord Mansfield wittily observed, "The college will not, most undoubtedly, agitate that question, for if they do, they must give up all their *livings*, &c. and all other advantages they claim under them." This ground was, of course, abandoned; and Mr. Solicitor-general, in his turn, stood corrected. So the great *Erasmus*, when called upon to give his decided opinion between pope Leo and the great reformer Luther, had some faults to find with both, and, in summing up his charge against the latter, observed, that poor Luther had sinned grievously and in a twofold capacity, first, in touching the pope upon his crown, and, secondly, the monks upon their bellies. The monarch smiled, and never forgot Erasmus's conclusion of "*Tetigit coronam pontificis, et ventres monasticorum.*" When Mr. Norton, with great ability, in his turn, strongly contended, that it was premature to determine then whether the bishop of Ely had jurisdiction; that there ought to be a rule for the plaintiffs to declare, that such was the course of the court, and it had not been usual to examine the matter upon shewing cause; after a declaration in prohibition, the whole would appear upon record, be solemnly judged, and the judgment might be reviewed upon a writ of error. To all which the lord chief justice answered fully, and with great energy. A few general observations only will be selected in proof of his sense of a delay in justice, and of unnecessary circuitry in proceedings of this nature: "If the party who applies for a prohibition has a right to declare, though the court should see no ground for the motion, a rule "to shew cause why the prohibition should not be granted" is to no purpose, and hearing counsel upon the sufficiency of that cause is time mis-spent.

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universities, and the ingrafted fellowships therein is presumed to be *doctrina paucis cognita*; it is reasonable to hope that a summary detail of lord Mansfield's elaborate discussion thereof will not be displeasing.

On the 29th of June, 1757, the important question was discussed in B. R. whether a court of law was not invested with power to relieve against fraud and imposition? As it has been frequently said and insisted, that lord Mansfield introduced more equity * into a court of law than any of his predecessors had done; the

If, in cases of this kind, the court should too easily yield to hang up the matter, by letting the plaintiff declare in prohibition, redress would come too late, and cost too much. I was very desirous, as there is no fact disputed, to go fully into the argument *now*, and, if I saw no ground to doubt of the bishop's jurisdiction as visitor, to stop unnecessary delay, vexation, and expence.

The subject matter of the complaint to the visitor is a competition for present maintenance and education upon an eleemosynary foundation. The cause of the contention is a *controverted election*, which is too apt to engage and animate the electors.

In compassion to the candidates, and for the peace of this learned body, the dispute *ought not* to be suffered to continue longer than is absolutely unavoidable. I have procured information concerning *most* of the colleges in Oxford and Cambridge; and I find that most of the old colleges in both universities consist and are made up (less or more) of *ingrafted* fellowships, and ingrafted by indentures too; and all these are considered *as part of the old body*, unless there be any particular exception by the terms of the new foundation. I am satisfied, upon mature reflection, the college would tremble at the *consequence* of leaving every election into any of these ingrafted fellowships, or any other disputes concerning them, open to courts of law, and the expence and delay attending suits in them. It seems to me very clear that the bishop is as much judge of *this* complaint, as if it related to one of the *old* fellowships: and, if it related to one of the old fellowships, I think the jurisdiction of the bishop as visitor *most evident*. Therefore I am of opinion, that the cause shewn against this rule is sufficient, and it ought to be discharged. In which opinion the other judges present concurred, and the rule was discharged accordingly.

* The following observations by the lord chief justice, respecting new trials and the right which a court of law ought to exercise in granting relief against fraud and imposition, arose in Trinity term 30th and 31st George II. in

the author of these sheets is desirous in the discussion of this matter of discharging his duty impartially, and in order thereto will
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in the case of Bright, executor of Hannah Crisp, widow, against Eynon, on a motion for a new trial on payment of costs. The plaintiff's counsel obtained a rule to shew cause why the verdict should not be set aside upon payment of costs; whereupon lord Mansfield said, that he did not chuse in any cause tried before him to conclude the matter by a short report, "that he was satisfied or dissatisfied with the verdict." He would state the case particularly to the court, and reserve declaring his opinion of the verdict (which he had not yet intimated either at the trial or since) till he had heard the counsel on both sides.

This was an action upon the case brought by the plaintiff as executor of Hannah Crisp, widow, deceased, against the defendant, upon a common promissory note for payment of sixty pounds and legal interest.

The defendant Eynon, who signed the note, set up a discharge in the following words:

"I promise unto John Eynon, that, in consideration of his paying unto me interest for sixty pounds, he has of mine during my life, after the rate of five pounds *per cent. per annum*, that then the said sixty pounds, at my decease, shall be his, and his note for the same shall be *void* and of *none effect*. Witness my hand this 10th day of October, 1753, Hannah Crisp." The body was all *his* own hand; but he called two witnesses, who said they believed the name subscribed to be the hand of the testatrix; but their knowledge of her hand was very slight, one of them having only seen her sign a receipt.

Lord Mansfield, after having stated all the circumstances of the case fully, said, he left two questions to the jury: 1st, "Whether the name of the testatrix was forged;" 2d, if they took it upon the evidence laid before them to be her hand, then, "whether it was not obtained by *fraud*, and without her *knowing* the contents and effect of the writing she signed." The jury found for the defendant. Lord Mansfield intimated nothing then as to his *own* opinion of the case; and professedly avoided doing it now till he should have heard the counsel. They were accordingly heard; and they who shewed cause against the rule, went very much at large into the propriety and rise of granting *new trials*. They urged that a verdict ought to be *conclusive* where evidence of any sort was given on *both* sides. That the forgery here was the *only question*: if the plaintiff objected *fraud* and *imposition*, he must go to a court of equity for relief. Lord Mansfield: Trials by jury in civil causes could not subsist now without a power *somewhere* to grant new trials. If an erroneous judgement be given in point of *law*, there are *many* ways to review and set it right. Where a court judges of fact upon *dispositions in writing*, their sentence or decree may, many ways, be reviewed

beg permission, as occasion may offer, to point out the true ground of such adoption, by assigning lord Mansfield's own reasons

and set right. But a general verdict can *only* be set right by a *new trial*, which is no more than having the cause more deliberately considered by *another jury*, when there is a reasonable doubt, or perhaps a certainty, that *justice has not been done*. The writ of attain is now a mere sound in *every* case: in *many* it does not pretend to be a remedy. There are numberless causes of false verdicts *without* corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be so intricate, the examination may be so long, as to distract and confound their attention. Most general verdicts include *legal consequences*, as well as propositions of fact: in drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be *surprised* by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice*, that there should upon many occasions be opportunities of *reconsidering* the cause by a new trial; and it is done in a way very favorable to the parties for whom the wrong verdict is given: it is upon payment of costs; whereas in *other* cases, where a wrong judgement is reversed, costs are paid as if the right judgement had been given in the first instance. It is *not true*, "that no new trials were granted *before 1655*," as has been said from Style 466. In Slade's case, m. 24, c. 1, (which was in 1648) in King's Bench reported in Style 138, the court was moved for judgement formerly stayed upon a certificate made by baron Atkins, "That the verdict passed against his opinion." Bacon Justice said, judgements have been arrested in the *Common Pleas*, upon *such certificates*. Hales of counsel with the defendant prayed, that the judgement, in that case of Slade, might be arrested, and that there might be a new trial; for that it had been done theretofore in like cases; indeed that case, as there reported, represents Rolle Justice, to hold "that it ought not to be stayed, *though it have been done in the Common Pleas*; for that it was too arbitrary for them to do it." And he adds, "you may have your attain against the jury; and there is no other remedy in law for you: but it were good to advise the party to suffer a new trial for better satisfaction."

In the case of Wood *versus* Gunston, Michaelmas, 1755, Banc. Sup. Style 466, (which was an action upon the case for speaking scandalous words of the plaintiff, and a verdict of the plaintiff with one thousand five hundred pounds damages), the defendant moved for a new trial; and Glyn Chief Justice said, "it was in the discretion of the *court*, in *some* cases, to grant

sons for his adherence to, or departure from, the rules and principles of equity in a court of law.

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grant a new trial: but this must be a *judicial*, and *not an arbitrary discretion*. And it is frequent, in our books, for the court to take notice of the miscarriages of juries, and *to grant new trials upon them*. And it is for the people's benefit that it should be so; for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them; but it cannot be so intended of the court." And in that case *a new trial was ordered*, upon the defendant's paying full costs, the judgement standing as a security to pay what might be recovered upon the next verdict. The reason why this matter cannot be traced farther back is, that the old report-books do not give any accounts of determinations made by the court upon motions. Indeed, for a good while after this time, the granting of new trials was holden to a degree of *strictness*, so intolerable, that it drove the parties into a *court of equity*, to have in effect a new trial at law of a *mere legal* question, because the verdict in justice, under all the circumstances, *ought not to conclude*: and many bills have been retained upon this ground; and the question tried over again at law under the direction of a court of equity. And therefore of *late years*, the courts of law have gone more *liberally* into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by lord Parker, in the case of the *queen against the corporation of Helston*, H. 12 Anne, B. R. seems to be the *best general rule* that can be laid down upon this subject; viz. "doing *justice* to the party," or, in other words, "attaining the *justice* of the case."

The reasons for granting a new trial must be collected from the *whole* evidence, and from the nature of the case, considered under *all its circumstances*.

This power may be exercised at much less expence of time and money, *therefore more beneficially for the subject*, by the *common law* where the cause has been tried.

Of late years new trials have been granted, not only after trials at *Nisi Prius*, but also after trials *at bar*. And it is at least *equally reasonable* to do it after the trials at bar as after trials at *Nisi Prius* (if the justice of the case demands it); or indeed rather *more so*, as the latter must be done upon what could have actually and personally appeared to a *single* judge only; whereas the former is grounded upon what must have manifestly and fully appeared to the *whole* court.

I come now to the present verdict; and should be sorry that the question depended upon *my* being satisfied or dissatisfied: and therefore I have stated the whole.

If the matter in dispute was of great *value*, I will not say, that all the suspicious circumstances *might not* be a ground for a new trial, to give the plaintiff

The increased liberality of courts of law in granting or refusing new trials, and the indubitable right vested in those courts

tiff an opportunity of getting the instrument *inspected* by persons acquainted with her *band*: though I think, upon the evidence *laid before the jury*, the verdict in *that* respect was *right*.

What I go upon is the apparent manifest *fraud* and *imposition* in obtaining the discharge from the testatrix, if she really signed it.

Fraud or covin may, in judgement of the law, *avoid* every kind of act: many instances are put in Fermor's case, 3 Co. 77.

"What circumstances and facts *amount* to such fraud or covin" is always a question of law. Courts of equity, and courts of law, have a concurrent jurisdiction to suppress and relieve against fraud. But the interposition of the former is often necessary for the *better investigating* truth, and to give *more complete* redress.

The writing upon the *force* of it speaks imposition. It imports being for *consideration*. She releases the principal in *consideration* of five pounds *per cent.* during her life; which is only legal interest, and the precise rate he was obliged to pay by his note. The defendant has set up *another* consideration not *expressed*, which is not only *not proved* by him, but *disproved* by the evidence on both sides.

He now contends, and his counsel have argued, "that it was intended to be revocable by her during her life, and therefore was only in the nature of a legacy." That power "to revoke" is *omitted*; the writing all of his *own band*, and kept in his *own custody*; and, if it was in the nature of a legacy, it is *revoked* by the subsequent will.

The testatrix *never imagined* she had stripped herself of this money: In her *circumstances* it would have been madness. The defendant, *during her life*, did not dare to say, even to his own wife, "that the testatrix had given him this money."

He did not dare to claim it *immediately* after her death; but would have *compounded*, by withdrawing his caveat, to have got his note delivered up. No answer was attempted, by proof, to the *apparent imposition*. Upon his own case, stated by himself, and the evidence on both sides, the transaction to get her hand to this writing must have been *fraudulent*, and if it be so, the law says, "he shall not avail himself of it."

The *attention* of the jury was artfully drawn to the heinous charge of forgery *only*; and I left the question of fraud to them without any express direction, "that the circumstances spoke fraud apparent." The *same* jury might, upon reconsideration, find a *different* verdict. I dare say, they meant to do right.

But the merits of the case appearing to me in this light, I am clearly of opinion, that there *ought* to be a *new trial*.

courts to punish fraud or covin, are clearly exemplified by lord Mansfield.

In Michaelmas Term, 1757, judgement was given by the court of King's Bench in the case of Wyndham and Chetwynd *, a very important and interesting case respecting the cre-

These are my sentiments : my brothers will judge whether I am right or not.

The other judges who were present concurred. Mr. Justice Wilmot was absent in chancery.

The cause never came on to be tried again : it is therefore probable, that the defendant acquiesced in the opinion of the court, and paid the money.

* Sir James Burrows, in his report of the case of Windham and Chetwynd upon a will of land, dated the 14th of May, 1750, and a codicil of the same date made by Walter Chetwynd, late of Grendon, Esq. deemed it to be unnecessary either to prefix the arguments of the counsel, or the authorities upon which they relied, as lord Mansfield entered into the case so very minutely in delivering the opinion of the court upon it. Dr. Burn, in his Ecclesiastical Law, p. 532, has given a short summary of these arguments ; and inasmuch as Sir James Burrows has reported fully and faithfully in his first volume, p. 417 to 430 inclusive, the opinion delivered by the chief justice on this very important case, the author of these sheets will only endeavour to point out the nice distinction made by lord Mansfield, as well between a person endeavouring to establish any particular devise of lands, in present, or in remainder, by his own testimony, as also respecting a subscribing witness, claiming only as a legatee, or as a creditor, of the testator. His lordship having laid down the rule, that a person shall not, in a court of justice, intitle himself to a devise by virtue of his own subscription, which, at the time of subscribing, he could not have proved by his examination, and having previously observed that there was not a single determination which carried the incapacity farther than that rule, immediately subjoined : " This is the case of Hilliard and Jennings, this is the resolution and judgement of the court in the case of *Ansty versus Dowling*." To proceed to the consideration of the different circumstances in the case before the court. The witnesses to the will and codicil of Mr. Chetwynd were in nature of legatees, there being a charge upon the residue of his real and personal estates for the payment of all his just debts, legacies, and incumbrances. Now the fact was, that Messrs. Squire and Baxter, two of the subscribing witnesses, were the testators attorneys, and as such had some unsettled accounts between them, but which before their examination in the cause were so far settled, as that a balance was due from them to the executor of the testator. The third was the testator's apothecary ; and the jury found, that
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credibility of witnesses to a will of land, which came before the court on a special verdict, and had, previous to the judgement of the court, been twice elaborately argued.

Lord Mansfield deemed it to be an important part of his duty as a judge to disentangle abstruse cases, which came before him, from the mazes and great intricacy which were frequently introduced by the elaborate arguments of counsel. He seemed to have a particular pleasure in discriminating between ingenious,

at the time of attesting the writings, and also at the time of the testator's death, there was due and owing to the third witness the sum of eighteen pounds, five shillings, and five pence: but they also found, that the executor of the testator had paid the said debt of eighteen pounds, five shillings, and five pence, to the third witness, before his examination in the cause; and that he had not, at the time of his examination, any demand upon the testator. In this situation, lord Mansfield, in the third and last head of a very learned and elaborate argument, wherein a perfect knowledge of the Roman law, as well as of the laws of the land, is displayed and critically discussed, concluded as follows: "The presumption of interest, at the time of *subscription*," is *taken off*, at the *death*, by the principal funds being more than sufficient: it is taken off *before* the trial by the debts being *paid*; but the benefit, at the time of subscribing, was nothing. It does not appear the principal funds *then* were deficient. The legacy is a *bare possibility* upon a contingency, which contingency never happened. But I will go farther. I think a charge "*to pay debts*" ought *not* to incapacitate subscribing witnesses, *although* they wanted and claimed the benefit of it. Every honest man should make that charge in his will; he who omits it is said to sin in his grave.

Fraud cannot be presumed from inserting a clause, which it would be iniquitous *not* to put in.

No man would resort to wicked and fraudulent practices, to get his debt charged upon land by the *will* of his debtor; if he suspected the debtor's circumstances, he would not stay till his death, or trust to a *revocable* security. The presumption of fraud in this case would be against justice and truth; and the public inconvenience so great that hardly a will could stand. This charge ought to be in every will. The persons attendant upon a dying testator, and therefore most common witnesses, are generally in *some* degree *creditors*; such as servants, parson, attorney, apothecary, &c. and the disallowing such persons to be witnesses cannot answer ends of public utility. Upon the whole, we are all of opinion, that this will is *duly* attested by three witnesses.

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clear, and convincing argument, and subtle metaphysical distinctions, tending to bewilder and mislead the Tyros or students in the law. As to their making any impression on the minds of the judges, if the allusion may be pardoned, we might as soon expect to see the hawk, in its passage through the regions of air, leave a print of his wild and circuitous flight behind him.

His ideas went to the growing melioration of the law, by making its liberality keep pace with the demands of justice, and the actual concerns of the world *; not restricting the infinitely-diversified occasions of men, and the rules of natural justice,

* The case of Goodman and Goodright, in Michaelmas Term, 1759, on error from the grand sessions in Wales, was upon a judgement there given for the plaintiff in an ejectment, brought by Richard Williams and Annabella, his wife, for lands in Denbighshire, in which the jury had, upon the trial of it, there found a special verdict, which the jurisprudent will find stated in the second Burr. 847. This case having been reported by Sir James Burrow, so as not to be relied on according to the observations, or rather censure of the Court of B. R. in the case of Fonnereau and Fonnereau, 20th George III. it may be proper to state the concise manner in which lord Mansfield cleared the case from the obscurity of the several diffuse arguments, as they were termed by Sir James Burrow, although the reporter allowed that several nice points were discussed in them, and that the reasonings of the counsel were supported by a great variety of cases. In delivering the resolution of the court, his lordship took notice, that this case, when stripped of a great deal of learning, which may very well be laid out of it, as not being at all essential to the determination of the present question, comes within a very narrow compass. The whole of the case comes singly to this question: "Whether Mrs. Mostyn, the testatrix, intended to give her nephew *Charles Lloyd*, and the heirs of his body, the remainder or reversion after *the death* of herself, and of *Dr. Edward Wynn* and *Anne* his wife, and of the heirs of their two bodies, and also of the heirs of *Anne's* body by any second husband, or whether she meant to give him an estate in possession?"

The counsel for the defendant in error very judiciously laboured to prove that Mrs. Mostyn meant, in this devise "to him, and the heirs of his body," to devise the estate to him *immediately*. This they found themselves obliged to insist upon, and to endeavour to maintain. But neither the words, nor the nature of the provision Mrs. Mostyn was making, will admit of this construction. For, the words do by no means import any thing like

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tice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and of our empire. This enlargement of commerce and of our empire, in the year 1744, he appears almost to have foreseen, and he lived to behold it. "The arguments on the other side," said that great light of the law, (that is, arguments against admitting the testimony, in question, from the novelty of the case,) "prove nothing. Does it follow from thence, that *no witnesses can be examined in a case, that never specifically existed before?* or that an action cannot be brought in a case that never happened before? Reason (being stated to be the first ground of all laws, by the author of the book called Doctor and Student) must determine the case. Therefore the only question is, whether upon *principles of reason, justice, and convenience, this witness be admissible?*"

Cases in law depend upon the occasions which gave rise to them; all occasions do not arise at once: now *a particular species of Indians appears; hereafter another species of Indians may arise. A statute* can seldom take in all cases. Therefore the common

it, but quite the reverse: and it can never be imagined to be her intention to exclude all the issue of her favorite niece *Anne Wynne*, in order to prefer *Charles Lloyd* and his issue: indeed, the direct contrary plainly appears. It is a future devise, to take place after an *indefinite* failure of issue of the body of a former devisee, which *far exceeds* the *allowed compass* of a life or lives in being, and 21 years after; (which is the line now drawn, and very sensibly and rightly drawn).

The *articles* can *not* be considered as executed: they are only a *covenant*, "that she will on the solemnization of the marriage at the request of *Edward Wynn* and *Anne*, at or after such time as *Edward Wynn* should settle his estate, &c. settle and convey hers." The will does not profess to be an execution of them; nor does it mention any trustees to preserve contingent remainders agreeable to the articles.

But if the *will* was an *execution of the articles*, then *Anne Wynn* was *tenant in tail*, and might suffer the recovery. If she took nothing under the will, she is *heir at law* to *Mrs. Mostyn*; and the lessor of the plaintiff has *no* title.

Therefore this judgement must be reversed.

law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to act of parliament.

From the period of this great judgement to the present time, the law has gone on continually working itself pure (to use lord Mansfield's expression) by rules drawn from the fountain of justice. "General rules," said the same person, when he sat upon the bench, are wisely established for obtaining justice with ease, certainty, and dispatch. But the great end of them being *to do justice*, the court will see, that it be *really obtained*.

On another occasion, a proposition being made for setting aside a verdict, he said, "this seems to be *the true way to come at justice*, and what we therefore ought to do; for, the true text is, *boni judicis est ampliare justitiam* (*non jurisdictionem* as has been often cited). In conformity to this principle, the supposed rules of evidence have, in late times and judgements, instead of being drawn to a greater degree of strictness, been greatly relaxed.

"*All evidence is according to the subject-matter to which it is applied.* There is a great deal of difference between length of time that operates as a *bar* to a claim, and that which is used only by way of evidence. Length of time, used merely by way of evidence, may be left to the consideration of the jury, to be credited or not, or to draw their inferences one way or the other, according to circumstances. *I do not know an instance in which proof may not be supplied.*" In all cases of evidence lord Mansfield's maxim was, to lean to *admissibility*, leaving the objections which were made to competency to go to the credit of the witness, and to be weighed in the minds of the jury after they had heard it. In objections to wills, and to the testimony of witnesses to them, he thought it clear that the judges ought to lean *against* objections to the formality, and against disqualification of a witness on account of a remote interest. In fine, his doctrines, and his unwearied attention, (as will be illustrated in their proper places,) tend forcibly and wisely to

settle the principles of departure from, or adherence to, the rules of evidence.

Desirous that the maritime law * should be more perfectly understood, that it should not be considered as the law of any particular

* The state of the case of Luke and others against Lyde, being very concise, is here transcribed.

The defendant † Lyde shipped a cargo of 1501 quintals of fish, at the port of Saint John's in Newfoundland, on-board the ship Sarah belonging to the plaintiffs, to be carried to Lisbon. The plaintiffs were to be paid freight, at the rate of two shillings per quintal.

The original price of the said cargo was, at Newfoundland, ten shillings and six pence, sterling, per quintal.

The plaintiffs had also, on-board the said Sarah, a cargo of 945 quintals of fish, which was their *own* property.

The ship sailed from the port of Saint John's on the 27th of November, 1756, and had proceeded seventeen days on her voyage; and was taken on the 14th of December following, within four days sail of Lisbon, by a French ship. And the captain, the other officers, and all the crew (except one man and a boy) were taken out of the Sarah, and put on-board the French ship. The ship Sarah was retaken on the 17th of the same December, 1756, by an English privateer; and on the 29th of December, 1756, brought into the port of Biddeford in Devonshire.

The plaintiffs, having insured the ship, and their part of the cargo, *abandoned* the same to the *insurers*. But the *freight*, which the owners were intitled to, was *not insured*.

The defendant had his goods of the recaptors, and paid them five shillings per quintal salvage, at the rate of ten shilling per quintal value.

The fish could not be sold at all, at Biddeford, nor at any other port in England, for more than ten shillings per quintal, clear of all charges and expences in bringing them to such port. And the most beneficial market (in the apprehension of every person), for disposing of the said cargo of fish, was at Bilboa in Spain; to which place the defendant *sent it*, in the *March* following; and there was no delay in the defendant in sending the said cargo thither. And it was sold there for five shillings and six pence per quintal, clear of the freight thither, and of all expences attending the sale there.

† Second Burr. 883.

particular realm, but as the *jus gentium* uncircumscribed, and boundless as the ocean itself, a special case from the preceding De-

The freight from Biddeford to Lisbon is higher than from Newfoundland to Lisbon.

From the time of the capture, the whole way that the ship was afterwards carried, was out of the course of her voyage to Lisbon.

The question was, "whether the plaintiffs are intitled to *any* and *what* freight, and at *what rate*, and subject to *what deduction*."

Mr. Hufley for the plaintiffs cited, as a foundation of his argument, the case of Lutwidge and How *versus* Grey *et alios*, heard on the 22d of February, 1733, in the House of Lords.

Lord Mansfield. The House of Lords determined upon these reasons, (delivered by the lord chancellor Talbot) "that the *whole freight* was due upon the goods sent to Bristol; because the master offered a ship to carry the goods to *Glasgow*, which was the port of delivery: but, as the *master declined* carrying the *other* goods to Glasgow (the port of their delivery), they determined that, as to *them*, he ought to be paid only *pro rata*; viz. as much as was proportionable to his carrying them to Youghall, the place where the accident happened;" and this was all agreeable to the maritime law.

Lord Mansfield said, that, though he was of the same opinion at the assizes as he was now, yet he was desirous to have a case made of it in order to settle the point more deliberately, solemnly, and notoriously, as it was of so extensive a nature; and especially as the maritime law is not the law of a particular country, but the general law of nations: "*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed, et apud omnes gentes et omni tempore, una eademque lex obtinebit.*"

He said, he always leaned, (even where he had himself no doubt,) to making *cases* for the opinion of the court, not only for the greater satisfaction of the parties in the particular cause, but to prevent other disputes, by making the rules of law, and the ground upon which they are established, *certain and notorious*; but he took particular care that this should not create *delay* or *expence* to the parties; and therefore he always dictated the case in court, and saw it signed by counsel before another cause was called; and always made it a condition in the rule, "that it should be set down to be argued within the first four days of the term." Upon the *same* principle, the motion, "to put off the argument of this case to the next term," was refused; and the plaintiff will now have his judgement within a few days, as soon as he could have entered it up if no case had been reserved, at the expence of a single argument only; and some rules of the maritime law, applicable to a variety of cases, will be better known. He said, before he entered into it particularly, he would lay down a few *principles*; which having done at some length, his lordship proceeded: I find by the ancientest laws in the world, (the Rhodian

Devonshire assizes, was reversed by lord Mansfield at the summer circuit, 1759.

Either as an embellishment to the present work, which, in its nature, and in order to be useful, must in general be grave and serious, or as a relaxation to the mind from the fatigue of constant attention to one uniform system of dry law, the author is desirous to introduce occasionally a few well-authenticated anecdotes; if an apology for such relaxation should be deemed necessary, it is to be hoped that the following *argumentum ad hominem* will be accepted as such. A very able and praise-worthy judge, the late Sir Joseph Yates, was accustomed to declare, that

Rhodian laws,) that the master shall have a *rateable* proportion, where he is in *no fault*. And *Consolato del mere*, a Spanish book, is also agreeable thereto. Ever since the laws of Oleron, it has been settled thus: In the usages and customs of the sea, (a French book,) with observations thereon, the fourth article of the laws of Oleron is, “that, if a vessel be rendered unfit to proceed in her voyage, and the mariners save as much of her lading as possibly they can; if the merchants require their goods of the master, he *may* deliver them, *if he pleases*, they *paying the freight in proportion* to the part of the voyage that *is performed*, and the costs of the salvage: but, if the master can readily *repair* his ship, he may do it; or, if he pleases, he may freight *another* ship to perform his voyage.” Amongst the observations thereon, the first is, “that this law does not relate to a total and entire loss, but only to *salvage*; or rather, not to the shipwreck, but to the *disabling* of a ship, so that she cannot proceed in her voyage without refitting: in which case the merchants may have their goods again, *paying the freight in proportion* to the way the ship made.”

And the case in the House of Lords between Lutwidge and How *versus* Gray *et alios*, is also in point, and was well considered there; and lord Talbot gave the reasons of the judgement of the house at length.

Therefore, in the present case, a *rateable proportion* of freight ought to be paid for *half* the goods.

The verdict must be for 60*l.* 14*s.* which upon computation amounts to the *rateable proportion* of the freight, being $\frac{17}{27}$ of 75*l.* the half of 150*l.*

Consequently the verdict which was for 70*l.* must be set right, and made 60*l.* 14*s.*

See also a very learned and elaborate opinion of lord Mansfield, on the nice distinctions between a total and an average loss in the special case of Hamilton and Mendes, Second Burr. 1208.

whenever

whenever intense application to any legal studies became burthen some or unpleasant, he changed the scene, read a few pages of Dean Swift's Works, which not only relieved him while he read, but also sent him back to his dry law in perfect good humour. In imitation of a character so distinguished and so pure, and without any design to depreciate the pre-eminence, I had almost said the sovereignty of the Dean of Saint Patrick, in the regions of wit and fancy, the following anecdotes are attempted to be placed in their true light of manifesting, that a grave judge may with impunity now and then introduce the golden rule of Horace, *Dulce est desipere in loco.*

An anecdote having appeared in the summer, 1760, in several public prints, purporting, that, early in lord Mansfield's chief justiceship, a certain diligent book-read advocate had taken up a considerable portion of the time of the court, in producing several black-letter cases, to prove the genuine construction of an old woman's will :

His lordship heard him with great patience for some time ; at last he interrupted and quite broke the string of his learning, by asking him, " whether he thought the old woman had ever heard of these cases ? and, if not, what common sense and justice must say to that matter ? " He therefore immediately gave judgment in favor of common sense against the black-letter-law, to the full satisfaction of the whole court.

The curious reader may be desirous of asking, whether the case of the old woman's will, or any similar case, which gave birth to the paragraph of the triumph of common sense, has been faithfully reported. The answer, respecting a similar case, is in the affirmative. For instance, the prisoners in the King's Bench prison were, in Trinity term 1760, advised, or were of themselves desirous, to try whether the chief justice would not be inclined to determine in their favor, by giving them the benefit of a legacy, in preference to the prisoners in the Marshalsea-prison. The case was simply this : Frederick Ashfield,
of

of Richmond in Surrey, gentleman, devised his copyhold estate (already surrendered to the use of his will), and also all his personal estate (after &c.), to trustees to be sold; and directed the produce to be laid out in freehold lands. Then he farther directs, that his trustees shall for ever issue, pay, and dispose of, the rents and profits unto and amongst such persons as for the time being shall be poor prisoners and insolvent debtors in the *Marshalsea-prison in the borough of Southwark in the county of Surrey*, and real and fit objects of charity, for and towards their subsistence, during their respective imprisonments *there*, in such manner, and in such parts and proportions, as his said trustees, and the survivors of them, and their heirs, should, from time to time, order, direct, and appoint.

Mr. Gould, the learned counsel for the prisoners in the prison of the *Court of King's Bench*, argued, that this devise belonged to his poor clients.

The devise is "*to the prisoners in the Marshalsea prison in the borough of Southwark*," which must mean *the prison of this court*. In support whereof he cited Co. 10. Rep. 69, 71, 72. The case of the *Marshalsea*; and *Spelman's Glossary*, title *Marshall*. And he observed, that the defendant, who is a prisoner in the *King's Bench prison*, is, and is always supposed (in the declaration against him) to be in *Custod' Marescalli Marechalsiæ Domini regis*. The other, (the defendant in the *Palace-Court*) in *Custod' Marescalli Marechalsiæ Hospitii Domini Regis*. He also cited first Bulstr. 207 to 212, *Cox versus Gray*, at large: and argued, that therefore, *propter excellentiam*, this devise is to the prisoners of the *prison of this court*. The counsel on the other side argued, and sufficiently shewed, that this devise *must* be understood to be to the prisoners in the prison of *the Marshal of the Household*.

Lord Mansfield was clearly of that opinion. He observed, that not only in vulgar speech, but likewise in many acts of parliament, the prison of *this court* is called the *King's Bench prison*,
and

and the *other* is called the *Marshalsea prison*. Both of them, indeed, are in the borough of *Southwark*, but each of them has its respective appellation. And this testator used the name that was always used by every body else in *Common Parlance*; without searching *Spelman's Glossary*, or my lord Coke's Reports, or Bulstrode's Reports, to find the *strict and legal* name. This is a sufficient reason for us *not* to make any order at all in the present case.

Note. This respective appellation of each of these prisons was agreed by the marshal of this court (on appeal to his own candor by lord Mansfield) to be the name used in *Common Parlance*.

So, on a motion for a new trial grounded on very nice constructions of the Mutiny-acts, the rule was discharged; lord Mansfield observing, that all these niceties were never thought of by those persons who have for many years drawn the Mutiny-acts: they are not drawn by gentlemen of the profession of the law; and the nature of the thing, as well as the intention of the legislature, requires that people should not be liable to actions for honestly executing them.

In private life, it may truly be said, that lord Mansfield had the facility and happy art of embellishing the most trivial circumstances with elegance, of enlivening conversation with ease and pleasantry, and of supporting every narration with strict attention to truth.

In his convivial conversation, he was particularly excellent. His general and almost universal knowledge of men and things presented a constant and copious supply of familiar dialogue and discourse. His sallies of pleasantry were innocent, and wounded no man; his sentences of observation were judicious and solid. His particular friends could easily illustrate this part of his character by a thousand familiar instances; the few which the author begs leave to select occasionally, as they serve to illustrate his character for ease and pleasantry, were *impromptu's*, delivered

on the spur of the occasion, and some of them are well known to his surviving friends.

One of the right reverend bench having very charitably established an alms-house, at his own expence, for 25 poor women; Mr. Murray, in his juvenile days, was applied to for an inscription to be placed over the portal of the house; upon which he took up his pencil, and immediately wrote the following:

“ Under this roof
the Lord Bishop of _____
keeps
no less than 25 women.”

This witticism probably had its rise from a then recent fact, which reflected great honor on the late Sir Walter Blackett, baronet, who was at that time the fast friend of, and much attached to, Mr. Murray, and also to Mr. Booth the conveyancer. Sir Walter stated his case to them in Lincoln's Inn, and pointed out the dilemma into which a friend in the North (Mr. Davison) had drawn him, by leaving 1500*l.* to be laid out, under the direction of Sir Walter, in building a suite of alms-houses for *twelve old women*, near Newcastle upon Tyne. Sir Walter added, how uncomfortable these poor creatures will be placed in a row, without any human being to look upon. What think you, my friends and counsellors, if I run up another wing for 12 old batchelors? The learned counsel agreed in opinion, that the charitable institution would thereby be freed from partiality, and be abundantly more comfortable and more complete.

The superstructures were soon raised, according to Mr. Sylvanus Urban's Report of *the remarkable events in the year 1753*; and according to common fame, in a year or two afterwards, several of the antient maidens and old batchelors looked with great complacency on each other, so as to occasion a few marriages to take place, and to make convenient room for other inmates and inhabitants under these hospitable habitations.

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The grateful attachment of Mr. Murray to those friends who had been kind to him in his juvenile days was exemplified in many instances, and particularly by his continuing, even when in a dignified situation, and in full career of business, to visit the first lord Foley in the country on a Saturday, and to remain with him till the Monday morning following, when business called him back to town. On a brother barrister's interrogating him, how he could spend his time where so little pleasantry or liveliness prevailed? "It is enough, said he, if I contribute, by my visits, to the entertainment of my *fast friends*; or, if I fail in that, I am sure to contribute, by lassitude, to the repose of my *own faculties*." The friendly attention of Mr. Foley to Mr. Murray was unquestionably of an important nature. For the authenticity of a report, respecting the precise nature of this early friendship, the author will not pretend to vouch; yet, when it is considered, that, at many distant periods of time, rumor has, with little variation, been brought home to the author, and from such respectable authority as strongly to induce the belief of Mr. Foley's having encouraged his young friend to take the line of the law preferably to the clerical line, which his slender fortune, as one of the numerous younger children of a noble family, first led him to think seriously of—is it now to be wondered at that fine links, like these, should form an indissoluble chain of friendship between the first lord Foley and the honorable Mr. Murray?

1760.

To resume the consideration of a few more legal disquisitions. In Michaelmas term 1760, a case* was ingeniously and judiciously

* This was the case of Doe, on the demise of Long, against Laming. The state of the case and the arguments of the counsel are too long to be
 S 2 trans-

ciously argued in the court of King's Bench, without going into a long and elaborate review of cases to settle a point of real consequence,

transcribed here : the jurispudent will find them in 2 Burr. 1100 to 1106. But the leading features of the case, as described by lord Mansfield and the other judges, are so strikingly delineated as to merit the attention of the curious reader.

Lord Mansfield.—The words are, to my niece A. C. and to the *heirs of her body* lawfully begotten or to be begotten, as well *females as males, and to their heirs and assigns for ever*, to be divided equally, share and share alike, as tenants in *common*, and not as joint tenants. The question is, “Whether it be contrary to the rules of law to understand in this case *heirs of the body of A. C.* as a description of children?” for, that such was the *intention of the testator* there can be little doubt.

It is to be lamented that questions of this kind have occasioned so much litigation and expence. The best way to settle them is to reduce the matter, if possible, to some *certain rules*.

It is clear, that where an estate is given to the ancestor “*and his heirs*,” either general or special, the term denotes the *quantity* of the estate which the ancestor takes, *viz.* either fee simple or fee tail. It is clear too, that a person, to take as a purchaser, must be described from every course of descent as heir at law, heir in borough-english, heir or heirs male of the body.

By an antient maxim of law, although the estate be limited to the ancestor expressly “for life,” *and after his death to his heirs* general or special, the heir shall take by *descent*, and the fee shall vest in the *ancestor*.

This maxim was originally introduced in favor of the *lord*, to prevent his being deprived of the fruits of the tenure, and likewise for the sake of *specialty creditors*.

The ancestor, had the limitation been construed a contingent remainder, *might* have destroyed it for his own benefit. “If he did *not* destroy it, the lord would have lost the fruits of his tenure, and the specialty-creditors their debts; therefore the law said, “Be the *intention* as it may, where an estate is given to the ancestor *and his heirs*, the fee shall vest in him.”

The reason of this maxim has long ceased, because tenures are now abolished, and contingent remainders may be preserved from being defeated before they come *in esse*; yet, having become a *rule of property*, it is *adhered to* in all cases *literally within it*, although the reason has ceased; but where there are circumstances which take the case out of *the letter* of this rule it is *departed from* in favor of intention, because the *reason* of the rule has *ceased*.

His lordship then proceeded to the consideration of several cases which had been cited by the counsel, and, having pointed out the lines which distinguished them from the present case, added, “It appears, therefore, from

sequence, *viz.* Whether, under particular circumstances, and in aid of the intention of the testator, words of limitation in a *will* may not be considered as words of *purchase*.

1762.

from all that I have been saying, that there is *no* such *fixed unvariable* rule as has been supposed ;” that words of limitation shall “ never, in any case, be construed as words of purchase.”

And the present case is the strongest that I can form any imagination of, to justify a construction, “ That the heirs of the body of *Ann Cornish* shall here take as *purchasers*.” The devise cannot take effect at *all*, but must be *absolutely void*, unless the heirs of her body take as *purchasers*.

Mr. Justice Denison concurred with his lordship in opinion, “ That courts of law, as well as courts of equity, will always construe wills agreeably to the intention of the testator, if such intention be *not contrary* to, and *inconsistent* with, the rules of law ;” and he shewed, that the intention of the testator, in the present case, must have been, “ that the heirs of the body of his niece, *Anne Cornish*, should take as purchasers.”

Mr. Justice Wilmot premised, that the court were obliged to the gentlemen who had argued this case at the bar, for declining to go into that long string of cases severally cited upon this subject ; for, the principle that must govern all cases of this kind is the *intention* of the testator, provided it be not inconsistent with the rules of law.

And all cases which depend upon the intention of the testator (which is the pole-star for the direction of devises) are best determined upon comparing all the parts of the devise itself, without looking into a multitude of other cases ; for each stands pretty much upon its own circumstances, and one is no rule for another, or very seldom at least.

Here the testator *intended*, beyond all doubt, that the children of his nephews and nieces should take the *inheritance in fee simple*, both males and females, *per capita*, as tenants in common, and this is a legal intention.

But this intention cannot *take effect* by giving an estate in *tail*, or in fee, to the *first* taker : for the intention of the testator must be *subservient to the law*, and not the law to the intention of the testator.

Now a testator, be his intention what it will, cannot make an estate descend to males and females all together, nor gavelkind lands to descend to them as tenants in common.

The testator's intention cannot, therefore, *take place*, by giving *Anne Cornish* an estate *tail*.

What then is to be done ? Why, as my lord Coke says, you are to *mould* the barbarous words and expressions of the testator so as to *effectuate* his intention, if you can do so without going contrary to the rules of law ; but you cannot do this *contrary* to the rules of law.

The

1762.

Bribery at elections is punishable at common law as well as by the statute.

In Trinity term 1762, the discussion of this very important question took place. This was the case of the King against Pitt, and the King against Mead. The defendants having been convicted of *bribery at an election for members of parliament*, upon an information granted by the court as at common law, the court had a doubt about the *sentence* they should pronounce upon them.

On the 25th of June, 1762, three very eminent counsel elaborately argued, that the court of King's Bench had no jurisdiction at common law to punish in the present instance. They were answered by an equal number for the prosecutor—prout 3 Burr. 1335. Lord Mansfield, in delivering the resolution of the court, premised,

The question therefore in the present case comes to this: Whether it be *absolutely necessary* that the words *heirs*, or *heirs male*, or *heirs of the body*, must be, in *all* cases, and under *all* circumstances, words of *limitation*?

Now it is certain, that in *some* cases, and under *some* circumstances, they *may* be construed words of *purchase*, either upon a *will* or upon a *deed*.

Mr. Justice Wilmot then cited two determinations upon a deed in support of his opinion, and proceeded, They are *not* to be construed as words of *limitation*, either upon a *will* or upon a *deed*, when the *manifest intention* of the testator, or of the parties, is declared to be, or clearly appears to be, “that they shall not be so construed.”

Now it is plain, in the present case, that the testator did not mean to use the words, “heirs of the body,” as words of *limitation*; it is as clear as if he had expressly said, “I do not intend these words in that sense.”

And as to Anne Cornish's taking an *equal* share in fee simple in common with her daughters, that construction can never hold; for, it is most certain, that the testator did not intend the division into equal shares to be *made*, till after *Anne Cornish's death*.

By the court unanimously.

Judgement for the defendant.

“That

“That wherever a practice, which is wrong or unreasonable, has happened to have been introduced for want of a sufficient advertence to the consequence of it, the best way is to set it right immediately, as soon as the inconvenience is observed, if former cases be not affected by the retrospect. *Bribery at elections for members of parliament* must undoubtedly, he said, have always been a *crime at common law*, and consequently *punishable by indictment or information*; but the act of 2 George II. c. 24, has introduced a very severe penalty, in order to enforce the laws then already in being, and because they had *not* been *sufficient* to prevent the evil. The crime certainly *still remains* a crime at *common law*. The legislature never meant to *take away* the common-law crime, but to *add* a penal action. This appears by the words, “or being any otherwise lawfully convicted thereof;” and we are all of us clear, “that it *still remains a crime at common law*.” And the present conviction, upon an *information granted by the court*, is just the same as if the defendants had been convicted upon an *indictment*.

The court now considers these two defendants as *remaining still liable* to the forfeiture and disabilities directed by the act of 2 George II. as the time limited for commencing prosecutions upon it is *not yet expired*; and therefore, in adjusting the punishment which ought at present to be inflicted upon them, they *do not* consider it as a punishment *adequate to their offence*, but as an *additional punishment over and above* the punishments inflicted by the act of parliament; to which statute-punishments they *still* remain liable.

Therefore, since both of them have *already suffered imprisonment* for some time, they only order that Pitt be imprisoned for six months longer, and Mead for three months longer.”

1763.

The author now begs permission to proceed to a summary discussion of the doctrine of *General Warrants*, which, in the year 1763, was introduced into Westminster Hall, with due solemnity, by the constitutional lawyers of that period, to the great increase of their reputation and fair fame.

The doctrine of General Warrants was, antecedent to the year 1763, acquiesced in by many, taken upon trust by others, but known to very few. The language of the warrant issued by lord Halifax will sufficiently shew the nature and tendency of it, and the general purpose for which it was issued*.

Under this authority, three of the messengers took in custody Mr. Dryden Leach, the supposed printer of the North Briton, No. 45, but who, in reality, was neither the author, the printer,

* “George Montagu Dunk, earl of Halifax, viscount Sunbury, and baron Halifax, one of the lords of his majesty’s most honorable privy council, lieutenant-general of his majesty’s forces, and principal secretary of state, &c. These are, in his majesty’s name, to authorize and require you, taking a constable to your assistance, to make strict and diligent *search for the authors, printers, and publishers*, of a seditious and treasonable paper, intituled, “The North Briton,” No. 45. Saturday, April 23, 1763, printed for G. Kearsley, in Ludgate-Street, London, and them or any of them *having found*, to *apprehend and seize, together with their papers*, and to bring in safe custody before me, to be examined concerning the premises, and farther dealt with according to law. In the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all other his majesty’s officers, civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you, as there shall be occasion. And, for your so doing, this shall be your warrant. Given at Saint James’s the 26th day of April, 1763, in the third year of his majesty’s reign.

“DUNK HALIFAX.

“To Nathan Carrington, John Money, James Watson, and Robert Blackmore, four of his majesty’s messengers in ordinary.”

nor

nor the publisher of that number. Mr. Leach brought his action of trespass in the court of Common Pleas against three king's messengers, for breaking and entering his house, and imprisoning him, without any lawful or probable cause, and laid his damages at two thousand pounds.

Lord chief justice Pratt tried the cause at Guildhall on the 10th of December, 1763; and the jury found a verdict for Mr. Leach, the plaintiff, and gave him four hundred pounds damages, besides his costs and charges. At the trial a bill of exceptions was tendered and received*.

The

* Sir James Burrow † gives the following curious and punctilious account of this bill of exceptions in error.

Soon after the court sat the lord chief justice Pratt came personally into court to confess (*ore tenus*) his seal put to a bill of exceptions in this case, pursuant to the requisition of the following writ, *viz.* "George the Third, &c. To our trusty and well-beloved Charles Pratt, Knight, our chief justice of the Bench, greeting. Whereas we have lately been informed, that in the record and process, and also in giving of judgement in a plaint, which was in our court before you and your associates, our justices of the said bench, by our writ, between Dryden Leach, and John Money, James Watson, and Robert Blackmore, in a plea of trespass, assault, and imprisonment, manifest error hath intervened, to the great damage of the said John, James, and Robert, which said record and process, for the error aforesaid, we have caused to be brought into our court before us. And now, on the behalf of the said John, James, and Robert, we are informed in our said court before us, that at the trial of the issue first joined between the said parties in the plea aforesaid, the counsel learned in the law of the said John, James, and Robert, alledged on their behalf certain exceptions to the opinion then declared and given by you; and that the said exceptions were then and there written in a certain bill, to which you put your seal, at the request of the said John, James, and Robert according to the form of the statute in such case made and provided; and the said John, James, and Robert, have brought into our court before us the said bill, with your seal put to the same, as it is said; whereupon the said John, James, and Robert, have besought us to do

† 3 Burr. 1692.

The business did not remain long in this situation. In Michaelmas term in the same year the errors assigned came on to be argued; and the jurisprudent who will attentively peruse the elaborate, well-digested, and very learned arguments of Mr. Solicitor-general De Grey, on the one hand, and Mr. Dunning on the other, will not only find, in 3 Burr. 1742, and in the twenty-five following pages, all the acumen and ingenuity of the bar on

what farther should seem meet to be done in this behalf, according to the form of the said statute; and forasmuch as by the said statute it is ordained, that, in such case, the justice, whose seal should be put to such exception, be commanded to *appear* before us at a certain day, to *confess* or *deny* his seal; therefore we command you, that you personally appear before us on the morrow of the Ascension of our Lord, wheresoever we shall then be in *England, to confess or deny the seal* so put to the said bill of exceptions as afore-said to be your seal, according to the form and effect of the said statute, and that you bring with you at the same time this writ. Witness, William lord Mansfield at Westminster, the 24th day of April, in the fifth year of our reign."

N. B. The bill of exceptions sealed by lord chief justice Pratt had been previously brought into this court, and was now in the hands of Mr. Owen, as secondary of the office of pleas; and all the proceedings down to, and including, the abovementioned writ, were entred upon the rolls of this court.

The lord chief justice Pratt being now come into this court, pursuant to the command contained in the said writ, delivered it to the lord chief justice of this court, Mr. Owen at the same time delivering the *original bill of exceptions* into lord Mansfield's hand; whereupon lord Mansfield, shewing to lord chief justice Pratt the seal thereto affixed, asked him, "Whether that was his lordship's seal or not?" To which question his lordship answered in the affirmative. Lord Mansfield redelivered the bill of exceptions to Mr. Owen, at the same time delivering to him the abovementioned writ, with orders "that it should be filed."

Note. There was *no written return* to this writ, but Mr. Owen proposed to indorse upon it, "Sir Charles Pratt, knight, the chief justice within named personally appeared in the court of the lord the king, before the king himself, &c. on the day of the return within written, and confessed, that the seal put to the bill of exceptions within mentioned is his seal."

The lord chief justice of the *Common Pleas* immediately retired, without sitting down; and the lord chief justice of this court attended him till he was got past the puisné judge, but not quite to the door of the court.

this

this interesting occasion, but will also be prepared to receive the concurrent opinion of the three puisne judges at the close of the first argumet.

Lord Mansfield was desirous of having a business of so great importance to the liberty of the subject probed to the bottom. He supposed it was intended to be argued again; and in order, as it were, to throw new light upon an *ulterius concilium*, his lordship observed "that a Bill of Exceptions supposes the evidence *true*, and questions the *competency* or *propriety* of it."

"Whether there was a *probable cause* or ground of suspicion," was a matter for the jury to determine; *that* is not *now* before the court; so, "whether the defendants detained the plaintiff an *unreasonable time*."

"But if it had been found to have been a reasonable time, yet it would be no justification to the defendants, because it is stated, that *this* man was neither "author, printer, nor publisher;" and *if* he was *not*, then they have taken up a man who was *not* the subject of the warrant.

"The three material questions are, first, "whether a *secretary of state*, acting as a conservator of the peace by the *common law*, is to be construed within the statutes of James I. and of the late king."

"The protection of the officers, if they have acted in obedience to the warrant, is *consequential*, in case a secretary of state is within these statutes.

"As to the arrest being made in *obedience* to the warrant, or only under *colour* of it, and without authority from it, *this* question depends upon the *construction* of the warrant, whether it must not be construed to mean "such persons as are under a *violent suspicion* of being guilty of the charge," for they cannot be *conclusively* considered as guilty till *after trial and conviction*. The warrant itself imports only *suspicion*; for it says, "to be brought before me, and examined and dealt with according to law;" and this

suspicion must eventually depend upon *future* trial ; therefore the warrant does not seem to me to mean *conclusive* guilt, but only *violent suspicion*. If the person apprehended should be tried and *acquitted*, it would shew "that he was not guilty ;" yet there might be sufficient cause of suspicion.

"Mr. Dunning says very rightly, that "to bring a person within 24 George II. the act must be done in obedience to the warrant."

"The last point is, whether this general warrant be good : one part of it may be laid out of the case ; for as to what relates to the *seizing his papers*, that part of it was *never executed* ; and therefore it is out of the case.

"It is not material to determine "whether the warrant be good or bad," except in the event of the case, being *within* 7 James I. but *not within* 24 George II.

"At present, as to the validity of the warrant, upon the single objection of the *incertainty of the person*, being *neither named nor described*. The common law, in many cases, gives authority to arrest *without* warrant, more especially, where taken in the very act ; and there are many cases where particular *acts of parliament* have given authority to apprehend under general warrants, as in the case of writs of assistance, or warrants to take up loose, idle, and disorderly people ; but here it is not contended, that the common law gave the officer authority to apprehend, nor that there is any act of parliament which warrants *this* case. Therefore it must stand upon *principles* of common law.

"It is not fit that the receiving or judging of the information should be left to the discretion of the *officer*. The *magistrate* ought to judge, and should give certain directions to the officer. This is so, upon reason and convenience. Then as to *authorities*. Hale and all others hold such an uncertain warrant *void* ; and there is no case or book to the contrary. It is said, "that the usage has been so, and that many such *have been* issued since the

Revo-

Revolution down to this time ;” but a *usage*, to grow into a law, ought to be a general usage *communiter usitata & approbata*, and which, after a long continuance, it would be mischievous to overturn. This is only the usage of a *particular office*, and contrary to the usage of all *other* justices and conservators of the peace. There is the less reason for regarding the usage, because the form of the warrant probably took its rise from a positive statute, and the former precedents were inadvertently followed after that law was expired.”

The case standing in the paper on Friday, 8th November, 1765, for farther argument ;

Mr. Yorke was now to have argued on behalf of the plaintiffs in error, and began to enter into his argument ; but when he came to mention the two cases cited by Mr. Dunning, both of which were determined before *lord Mansfield*, upon the 24th of George II. c. 44. one of them at *Norwich*, summer assizes, 1761, where damages were given, the other of them on a warrant under the vagrant act of 17 George II. where his lordship held “that the defendant ought to shew, that the officer had acted in *obedience* to the warrant,” and he did so : he seemed to intimate, that this objection “of their not having done so in the present case,” was too great a difficulty for him to encounter ; and therefore rested the matter where it was, without proceeding any farther in his argument.

Lord Mansfield remembered both these cases ; and said, “he still continued of the same opinion.”

“Where the justice cannot be liable, the officer is not within the protection of the act. The case in Middlesex concludes exactly to the present case ; for here the warrant is to take up the *author*, *printer*, or *publisher* ; but they took up a person that was neither *author*, *printer*, nor *publisher* ; so that case was a warrant “to take up a *disorderly* woman,” and the defendant took up a woman who was not so ; and he held the same opinion now, he said, as he

he did before in the case at *Norwich*. *This makes an end of the case*; for this is a *previous* question, and the *foundation* of the defence fails. The consequence is, that the judgement must be affirmed."

The other judges assenting, it was affirmed accordingly. Thus general warrants sunk into desuetude for the noblest of all purposes, the permanent security of the liberty of the subject.

1765.

In 1765, Doctor Warburton, then bishop of *Gloucester*, republished his *Divine Legation of Moses*. The repeated acts of friendship and patronage which lord Mansfield manifested with great alacrity, and conferred with peculiar grace on learned men, naturally and gratefully prompted the learned prelate to dedicate this republication to his patron and friend, with great ability, and with a degree of animation worthy of *Warburton*.

In his address, he pointed out the rise and progress of the spirit of irreligion and licentiousness which then prevailed. In the course of this narrative, which deserves at this time to be read, he mentions, as a peculiarly fortunate circumstance, "that, while every other part of the community seems to lie *in facie Romuli*, the administration of public justice in ENGLAND runs as pure as where nearest to its celestial source, purer than PLATO dared venture to conceive it even in his feigned Republic." He proceeds, "Now whether we are not to call this the interposing hand of Providence; for I am sure all History doth not afford another instance of so much purity and integrity in one part co-existing with so much decay, and so many infirmities in the rest, or whether profounder politicians may not be able to discover some hidden force, some peculiar virtue, in the essential parts, or in the well-adapted frame of our excellent constitution: In either case this singular and shining phenomenon hath afforded a
cheerful

cheerful consolation to thinking men amidst all this dark aspect from our disorders and distresses.

“ But the evil genius of England would not suffer us to enjoy it long ; for, as if envious of this last support of government, he hath now instigated his blackest agents to the very extent of their malignity, who, after the most villainous insults on all other orders and ranks in society, have at length proceeded to calumniate even the king’s supreme court of justice, under its ablest and most unblemished administration.

“ After this, who will be tempted to despair of his country, and say, with the good old man in the scene ;

“ *Ipsa si cupiat salus*

“ *Servare, prorsus non potest, hanc familiam ?*”

“ Athens, indeed, fell by degenerate manners like our own ; but she fell the later, and with the less dishonor, for having always kept inviolate that reverence which she, and indeed all Greece, had been long accustomed to pay to her august court of Areopagus. Of this modest reserve, amidst a general disorder, we have a striking instance in the conduct of one of the principal instruments of her ruin.

“ The witty Aristophanes began, as all such instruments do, whether with wit or without, by deriding Virtue and Religion ; and this in the brightest exemplar of both, the godlike Socrates. The libeller went on to attack all conditions of men. He calumniated the magistrates ; he turned the public assemblies into ridicule ; and with the most beastly and blasphemous abuse outraged their priests, their altars, nay the very established gods themselves ; but here he stopped, and, unawed by all besides, whether of divine or human, he did not dare to cast so much as one licentious trait against that venerable judicature ; a circumstance which the readers of his witty sayings cannot but observe with surprize and admiration—not at the poet’s modesty, for he had
none,

none, but at the remaining virtue of a debauched and ruined people; who yet would not bear to see that clear fountain of justice defiled by the odious spawn of buffoons and libellers.

“Nor was this the only consolation which Athens had in its calamities. Its pride was flattered in falling by apostate wits of the first order; while the agents of public mischief amongst us, with the hoarse notes and blunt pens of ballad-makers, not only accelerate our ruin, but accumulate our disgraces; wretches the most contemptible for their parts, the most infernal for their manners.

“To conclude. Great men, my lord, are sent for the times; the times are fitted for the rest, of common make—Erasmus, and the present chief justice of England (whatever he may think), were sent by Providence, for the sake of humanity, to adorn two periods, when Religion at one time, and Society at another, most needed their support; I do not say of their great talents, but of that *heroic moderation*, so necessary to allay the violence of public disorders; for, to be *moderate* amidst party extremes requires no common degree of patriotic courage.

“Such characters rarely fail to perform much of the task for which they were sent, but never without finding their labour ill repaid, even by those in whose service it was employed. *That glory of the priesthood* left the world he had so nobly benefited with this tender complaint: “*Hoc tempore nihil scribi aut agi potest quod non pateat calumniæ; nec raro fit, ut dum agis circumspectissime utrumque partem offendas, quum in utraque sint qui pariter insaniant.*” A complaint, fated, alas! to be the motto of every man who greatly serves his country.”

The very elegant tribute of respect to the memory of lord Mansfield paid by another highly distinguished prelate, the *bishop of Worcester*, in his Preface to a new edition of Bishop Warburton's Works, will, it is humbly conceived, come in more appositely towards the conclusion of this work.

In

In the same year, 1765, upon the death of the late lord chancellor Hardwicke, a warm contest arose in the university of Cambridge, between the earls of Sandwich and Hardwicke, for the office of high steward, wherein the effect of Queen Elizabeth's statutes and of the old ordinances was elaborately discussed. The contest terminated in favor of lord Hardwicke, and the jurisperit will find much deep learning on the subject in 3 Burr. 1647, who employs near twenty folio pages in reporting the arguments and judgement of the court.

The *Earl of Mansfield* in his *moral character* was irreproachable, instructive, and exemplary. Whoever examines this serene part of his character with an impartial, discerning eye, with a view to profit by the various admonitory hints, which he took every fair occasion to inculcate, even in his judicial capacity, cannot fail to view this illustrious character in a very pleasing light.

To manifest his opinion of the salutary effects of the new gaols in Suffex, Gloucester, Oxford, Stafford, and other counties, where useful reform has been promoted by solitary confinement, he was accustomed to relate the following anecdote or little dialogue between himself and the governor of Horsham new gaol in Suffex.

Lord Mansfield.—“A few hours only have flitted or passed away, since, in the discharge of my duty as a judge, I delivered your new gaol. I was very much pleased at the sight of a calendar where the number of prisoners, which formerly have fallen to my lot to try for offences at Horsham, was reduced more than one half; I am now very much astonished to find, that the few prisoners I have tried at this period would not occupy one fourth part of the new gaol. How can your lord lieutenant satisfy the county of Suffex, that there has not been prodigality and waste of the county-money, in raising so large and stately an edifice, three-fourths of which appear to be untenanted?”

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The answer was : " My lord, I must leave his grace of Richmond to answer for himself : I have very little doubt of our lord lieutenant acquitting himself of your lordship's heavy charge of *prodigality*. This, my lord, I can truly say, that I was twelve years keeper of the old gaol, and have been near twelve years governor or keeper of the present county-prison. I can say farther, that the new gaol was built upon a plan to contain the average number of criminals and debtors which the old prison was accustomed to hold in durance vile. But, my lord, although in days of yore my visitors were very troublesome, and very frequent in their visits to me, discharged at one assizes, and in prison again within the old walls long before the next ; yet such, my lord, is the effect of our *solitary confinement*, and of making a rogue think a little, and become *acquainted with himself*, that, in the course of the last twelve years, I can solemnly declare before your lordship, that only *one single prisoner* has been *twice* within these walls !"

" Good God !" replied the noble Earl, " this language of experience is very forcible, and the fact ought to be more generally known."

If a digression of a few lines may be pardonable in the author, he can, with pleasure, add, that, on his relation of this plain fact at a county-meeting, when the consideration of the plan for a new gaol and moderate solitary confinement were the subjects to be discussed, the lord lieutenant of the county of Stafford was pleased to express his entire approbation of Mr. Howard's plan of prisons, and particularly of separate or solitary confinement, and to request that any magistrate then present, who had any objections to make thereto, would answer the author of these sheets, who had told the plain tale respecting Horsham new gaol, and would refute, if possible, the governor of Horsham new prison and the language of experience.

An interval of silence prevailed ; no objector rose to attempt a refutation, or to militate against the proposition for a new gaol, principally founded on the model of Gloucester gaol. The work was begun in 1789 ; in 1792 it was completed. In the year 1793 it was inhabited very thinly indeed ; the number of prisoners in the calendar of this year being reduced nearly one half below that of the year 1791.

Thus one more suffrage is added to the system of useful reform, which, as experience has evinced, may be wisely promoted by well-timed and moderate solitary confinement.

The virtues which were most conspicuous in lord Mansfield's private character, and which gained most on his affections, were a love of moral rectitude, and fidelity in friendship. In public as in private life, his precepts and his practice inculcated, recommended, and enforced, every branch of moral rectitude. In trying a cause at the sittings after term at Guildhall, a merchant lost his temper, who was the defendant in an action of debt, in detailing, with great warmth, to the chief justice, the great *indignity* put upon him, a merchant of London, by the plaintiff, in causing him to be arrested, not only in the face of day, but on the *Royal Exchange* !

Lord Mansfield, with great composure, stopped him, saying, " Friend, you forget yourself ; you were the great defaulter, in refusing to pay a just debt ; and let me give you a piece of advice, worth more to you than the debt and costs. Be careful in future not to put it in any man's power to arrest you for a *just debt*, in *public* or in *private*."

In his friendships, he was cautious in making them, but none was more constant in preserving the various links when they were riveted, or more zealous in the discharge of all the pleasing duties of friendship. The learned man, in him, frequently found a patron, and a zealous promoter of his merit. And whenever an ingenious barrister was discovered, whose for-

tune was small, or whose friends were few, he was soothed and rejoiced to find, unasked, and when least expected, some generous plan suggested, matured, and carried into execution, to extricate him from difficulties, or to point out the path to future fame.

Some of the shining ornaments of the bar have in early life experienced the vicissitudes of fickle fortune, have had their legal studies embittered with difficulties and distress. Not a few, who have emerged from early embarrassment, will, I am persuaded, ever recollect with gratitude, and may exult in the recollection of the earl of Mansfield's interposition in their behalfs, and in various pleasing instances conducted with peculiar adroitness and delicacy, so as not to wound the feelings of any one.

His lordship had read with critical accuracy, and with a penetrating eye, the important book of human life, and was very skilful in probing the heart of man. He could develope stratagem, however artfully concealed under the cloak of hypocrisy or dissimulation.

In the Tuscan code of laws promulgated and established with some success by the late emperor of Germany, when duke of Tuscany we learn, that *certainly of punishment*, after the guilt of the perpetrator of a crime had been fully proved, contributed forcibly and considerably to the *prevention of crimes*. Lord Mansfield seems to have coincided in this opinion generally, and particularly when the very dangerous crime of forgery in a commercial state became the serious subject of discussion. Not a life of unspotted integrity previous to the commission of a single crime could save Robert Perreau, the favorite companion of *some*, and the excellent apothecary to *many*, noble families. By honest industry and uncommon diligence in his medical profession he had acquired something like a competency, but, like too many vain and aspiring mortals, he must move in a different sphere, and gain a large fortune in the *banking-line*. Deluded and de-

deceived by a brother, and by a most artful woman—a forgery was committed, and his life paid the forfeit to the laws of his country. The intercessions of the great did not weigh in the balance which the chief justice held in the council. Forgery is a stab to commerce, and only to be tolerated in a commercial nation when the foul crime of murder is pardoned.

A few years afterwards Dr. Dodd's sentence for a similar crime of forgery became the serious subject of debate in a high circle. Great interest was made to mitigate the sentence; but the strong expression of the chief justice is said to have precluded mitigation, which, according to general report, was to the following effect: "If Dr. Dodd does not suffer the just sentence of the law, the Perreaus may be said to have been murdered."

1768.

The singular events of the year 1768 were the causes of the public prints being, for the *first time*, deluged with *torrents* of abuse on the lord chief justice. These events therefore seem to merit particular attention and dispassionate investigation, with a view to discover whether the virulence of this abuse was merited, and whether the discussion thereof may be scrutinized, without endangering the legal reputation and exalted character of the earl of Mansfield.

The general election was in that year. Mr. Wilkes, returned from abroad, became a candidate for the city of London, and afterwards was chosen representative for the county of Middlesex. Having been outlawed some years before, he now applied for a reversal of that proceeding. The consideration of it came several times before the court of King's Bench; and the jurisperit will find a general and faithful account of the various proceedings, given by Sir James Burrow in his Fourth Volume of Reports, p. 2527, and in the twenty subsequent pages; a diligent perusal whereof will not fail to impress on his mind, not only the

the intense application, industry, and ingenuity, of the bar, exercised in deep researches into black-letter law, but also the very able assistance given by the puisné judges, previous to the judgment of the court, wherein all the labyrinths seem to have been explored, which for many centuries had lain unexplored; and which, by any possibility, might lead to the developement or elucidation of the mazy and dark paths of *outlawry*.

The severity of the punishment in some instances, the fatal consequences of flight in others, seem to preponderate in favor of a faithful transcript of lord Mansfield's long, diversified, and wonderful speech. The author is not a little apprehensive that the discussion of, and enquiry into, forms of office and ancient precedents, may be unentertaining to some readers; yet, inasmuch as they are the foundation on which the reversal of the outlawry was built, it is to be hoped that the insertion of the formal part will be pardonable; while the glowing language and brilliancy of the latter part, when assimilated with the former, seem to exhibit diversified tints, like those of light and shade in a *chef d'œuvre* of a Claude or a Titian, and cannot fail to captivate, so long as animated diction and purity of style possess the power of pleasing.

His lordship, after having paid a handsome tribute of gratitude to the bench and the bar for the able assistance he had received from both, proceeded thus:

“It is not only a justice due to the crown, and the party in every criminal cause where doubts arise, to weigh well the grounds and reasons of the judgment; but it is of great consequence to explain them with accuracy and precision in open court, especially if the questions be of a general tendency, and upon topics never before fully considered and settled, that the criminal law of the land may be certain and known.

“Outlawry is a very important part of that law *. Yet it is no wonder, that the forms and method of proceeding are so little attended to, and so lit-

* Fourth Burr. 2549.

tle understood: for this is perhaps the first occasion where any question of law upon a writ of error to reverse an outlawry in a *criminal* case, ever underwent a serious litigation.

“ Outlawry in *civil* actions is considered, as in the nature of civil process, to compel an appearance to the suit, or, if after judgement, to procure satisfaction. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, pays all the costs, puts in sufficient bail, and does every thing he can to put the plaintiff in as good a condition as he would have been in originally; or if, after judgement, the outlaw pays the debt and costs; the court reverses the outlawry upon motion *without* any writ of error. The *form* of the reversal always is, “ for the errors *assigned*, and *other* errors *appearing upon the record* ;” although there is in truth *no* error at all.

“ *Flight*, in *criminal* cases, is itself a crime. If an innocent man flies for treason or felony, he forfeits all his goods and chattels. Outlawry in a *capital* case is as a *conviction* for the crime; and many men, who never were tried, have been executed upon the outlawry.

“ In *misdemeanors*, outlawry is generally a more severe punishment than would be inflicted for the crime of which the outlaw stands accused or convicted. It is a forfeiture of his goods and chattels, and all the profits of his real estate, and perpetual imprisonment, with many incapacities. If it is erroneous, it cannot be reversed without a writ of error.

“ Till the Third of queen *Anne*, a writ of error, in any *criminal* case, was held to be merely *ex gratia*. Lord Keeper lays it down *, “ that a writ of error, in a *criminal* matter, was *ex gratia regis*, in all cases;” and said †, “ he had a collection of several cases out of the old books of the law, that were given him by lord chief justice *Hale*, which shew, that writs of error, in *criminal* cases, are not grantable *ex debito justitiæ*, but *ex gratia regis*; and in such a case a man ought to make application to the king, and he will then refer it to his counsel; and, if they certify that there is error, the king will not deny a writ of error.” It never was granted, except when the king from justice, where there really was error, or from favor, though there was no error, was *willing* the outlawry should be reversed. After a writ of error

* 1. Vernon, 170. *Crawle versus Crawle*.

† Vide 1. Vernon, 175, in the *Rioters' case*.

granted,

granted, the attorney-general never made any opposition, because either he had certified "there was error," and then he could not argue against his own certificate; or the crown meant to shew favour, and then he had orders "not to oppose." The king, who alone was concerned as the prosecutor, and who had the absolute power of pardon, being *willing* that the outlawry should be reversed; this court reversed upon very *slight and trivial* objections, which could not have prevailed if any opposition had been made, or if the precedent had been of consequence. The *form* of reversal, "for the errors assigned, *and other errors* appearing upon record," delivered the court from the necessity of *specifying* any; and they might think themselves well warranted to reverse, upon the tacit or express consent of the king, where he alone was concerned to oppose, though there really was no error at all: and, as the king had the power to *refuse* a writ of error, the precedent was of *no consequence*.

"But in the Third of queen Anne *, ten of the judges were of opinion, "that in *all cases under* treason and felony, a writ of error *was not merely of grace*, but *ought* to be granted." *Price* and *Smith* were of a contrary opinion, "that a writ of error was of *grace only* in *all criminal cases*." The ten did not mean "that it was a writ *of course*," but that "where there was *probable error it ought not to be denied*."

"It cannot issue *now* without a *fiat* from the attorney-general, who always examines whether it be sought merely for delay, or for a probable error.

"In the case of the king against *Earbury* †, the opinion of the court was taken before the attorney-general granted his fiat for a writ of error. In the present case the attorney-general refused his fiat, while the defendant was out of custody.

"This opinion in the Third of queen Anne has made a great alteration as to outlawries in criminal cases *under* treason and felony. In a *misdemeanor*, if there be *probable cause*, it *ought not to be denied*: this court would *order* the attorney-general to grant his fiat. But, be the error ever so manifest in *treason* or *felony*, the king's pleasure to deny the writ is *conclusive*. Lord *Muskerry*, the son and heir of the earl of *Clanclarty*, petitioned for a writ of error to reverse his father's outlawry, because his father was a prisoner in the Tower of *Lor-*

* Vide the Aylesbury case.

† 9 George I. Vide ante, p. 2530.

don, during the whole time of the proceedings against him. The fact was verified beyond doubt, by entries from the books of the Tower, and by the affidavit of the dutchess of *Marlborough*. The late lord chief justice *Willes*, then attorney-general, reported the writ to be *merely of grace*; and, upon political reasons, it was absolutely refused, and the outlawry stands.

“A writ of error being as a matter of right, where there is error in the outlawry, since the Third of queen Anne, in all crimes under treason and felony, “What is an error” *became an important question*, which was of no consequence before. Since that time, this court has not given way to *trivial* objections, though admitted by the attorney-general. In 1708 lord *Griffin* was brought into this court upon an outlawry for high treason; and, upon the prayer of the solicitor-general (there being then no attorney-general), a rule was made for his execution. He was reprieved from time to time till his death. His grandson and heir, from the grace and favor of king *George* the First, obtained a writ of error. *Sir Philip Yorke*, then attorney-general, came into court, and said, he had a sign manual “to *confess the errors*, and consent to the reversal.” The court told him, “*his confessing an error in law* would not do; they *must judge* it to be an error, and *their judgement* would be a precedent. But the plaintiff in error might assign an error in *fact*, which, by proper authority, he might confess.” Accordingly the plaintiff assigned an error in *fact*; viz. “that the place of his grandfather’s residence was in the county of *Northampton*, whereas he had been outlawed in *London*.” The attorney-general confessed the fact, whereupon the outlawry was reversed*. Since the Third of queen Anne, no question of law has been *litigated* upon a writ of error to reverse an outlawry; no criminal outlawry has been reversed upon a *trivial* objection: no case since that time has been found of *either* kind.

“Outlawry is an essential part of the criminal law. The rules and method of proceeding are wisely calculated to prevent ignorance and surprize; the consequences are made severe, because the offence is heinous, and it imports the state that no man should fly from the laws and justice of his country. This court is bound to pronounce the law as they think it is, always leaning to the favourable side, where they doubt; for so says the law. It is as much a breach of duty to reverse a good, as it would be to affirm a bad, outlawry.

* Hil. 13 George I.

The mischief goes farther than an unrighteous sentence in the particular case; for, to reverse without an error is to abolish that part of the law. And therefore serjeant *Glynn* admitted that criminal outlawries were not to be reversed of course; an error must be found.

“In a matter where the consequence may be so penal to the defendant in this particular case, where the grounds of the judgement must be so important to a very essential part of the criminal law never before brought adversely in question, and therefore lying under great obscurity and confusion, I feel myself extremely obliged (and I think the public obliged) to those who, in the short time taken for consideration, have searched the subject to the bottom. From the materials with which I have been furnished, I think myself sufficiently instructed to form an opinion; and I will declare the grounds and reasons of that opinion which I have formed, to this great and numerous audience, with as much accuracy as I can, to prevent misapprehension.

There are two sorts of error which have been assigned and argued.

I. The first sort are errors which give rise to questions of law and real arguments.

II. The second are criticisms upon words and syllables in the return.

Of the first, two are assigned:

1. That there is no *sufficient information* filed or exhibited against the defendant, whereon to ground the process of outlawry.

2. That no *public proclamation* whatsoever is mentioned to have been made at any open court, or at any general quarter-sessions of the peace whatsoever, or at the doors of any parish-church where the said defendant was an inhabitant, according to the exigency of the said writ of *Capias cum Proclamatione*.

Under the first error assigned, three objections have been made.

I. That the information is by the *solicitor-general*, and not the attorney-general.

II. That an outlawry does *not lie* upon an *information*.

III. That, though it may lie upon an information, yet it does not lie for *such an offence* as is prosecuted in either of *these* cases.

First. The information is by the *solicitor-general*. If this objection is founded, it will equally hold upon a motion in arrest of judgement; but I believe none of us, from the beginning, ever entertained the least doubt concerning it. An information for a misdemeanor is the king's suit. The

title of the cause is, "the king against the defendant." The oath at the trial, to the jurors and the witnesses, is, "between the king and the defendant." As a subject sues by attorney, so does the king, with a little variation of form, from decency: instead of saying, "the king sues by," it is said, "sues for the king:" and yet *coram domino rege venit * dominus rex per attornatum suum, et inde producit sectam,*" was held to be good. (Hale chief justice said, it was but an unmannerly way of declaring for the king.) The attorney is answerable, if he acts without authority; and upon complaint by the party whose name he has falsely used, the court would punish him, and set aside the proceedings: but, while the principal avows him, neither the adverse party nor the court can dispute his authority. The coroner of this court prosecutes informations for the king as his attorney. The form of the proclamation, at criminal trials, is a strong proof that antiently the king's serjeant might prosecute for the king. When there did not exist such an officer as solicitor-general, the king's serjeant, or his attorney, or other that would sue for the king, should be received to aver against the testimony of the parties imprisonment, where the outlawry was pronounced at the king's suit †. There are many entries in Raftal ‡, which shew, that, at the common law, others than the attorney-general have sued for the king; or, in other words, the king has sued by others as his attorneys. Serjeant Glynn cited a manuscript treatise concerning the star-chamber, of which Mr. Filmer has a copy. The original is in the Museum §. The author's name is preserved in a note written in this present book, at the beginning, by the lord keeper Finch, as follows: "This treatise was compiled by William Hudson, of Gray's Inn, Esq. one very much practised, and of great experience in the star-chamber, and my very affectionate friend. His son and heir Mr. Christopher Hudson, (whose hand-writing this book is,) after his father's death, gave it to me, 19th December, 1635, J. Finch." The whole passage should be taken together, and is in these words: "It remaineth, that I shall,

* 2d Lev. 82. 3 Keble 127. Raftal's Entr. 655.

† Vid. 5 Ed. III. c. 13.

‡ Title, Debt, 192, pl. 4. Title, Escheat, 113, pl. 3. Title, Quare impedit, 527, pl. 1.

§ Harleian Catalogue, No. 1226. vol. I.

in the next place, treat of the king's ordinary suits, which are of two sorts, either by his attorney informing of himself, or by other men's relations, and by the king's almoner; the one being in criminal causes, the other in civil. For the king's attorney I have known it much questioned, whether any other of the king's counsel may not inform for the king, as well as the attorney-general. And it is true, that in *Easter Term 8 H. VIII.* it is ordered, that the king's solicitor-general shall not prosecute any farther the merchants of the *Stiliard*, till it were otherwise ordered by the council; and, the same term, the solicitor was commanded to sue out process against some which acquitted one *Blase* of a rape. So that it seemeth that others of the king's counsel did prosecute causes for the king, as well as the king's attorney. But, in *1st and 2d James the First*, it was resolved by the court, that it belongeth to the place of the attorney; and serjeant *Heale*, the king's serjeant, putting in a bill against *Sir John Luson*, was denied that privilege; for, if a bill be put in by the king's counsel, as for the king, there are no costs to be paid to the defendant, nor fees for the prosecution: but in this case serjeant *Heale's* bill was dismissed with thirty pounds costs, it continuing in prosecution not above two terms. It is astonishing how any other law-officer of the king could claim, *as an official right*, to be the king's attorney in all suits which he should think fit to bring in the king's name. The very constitution of an attorney-general is decisive against it; he might stop every suit brought by another; and therefore the counsel did very right, as between the king's law-officers, to over-rule serjeant *Heale*; but they did not mean that the king himself, for special reasons, might not appoint another to act as his attorney. In that reign, afterwards, *Yelverton* was suspended, and the solicitor appointed to act. Suppose the attorney-general personally the defendant, there must be another to sue for the king. Suppose the attorney-general out of the realm, or under a disability from sickness; suppose the office of attorney-general vacant: when it is, the business (which cannot stand still) must devolve upon another of the king's counsel: and there is nothing so certain, as that the whole business and authority of the attorney devolves upon the solicitor-general. I am satisfied that, if the matter was traced, the two precedents in *Easter Term 8 H. VIII.* mentioned by Mr. *Hudson* were during the vacancy of the attorney's office.

It is impossible the counsel could, in the same term, order the solicitor-general to stop one public prosecution and commence another, if there had been an attorney-general. As far back as the memory of the vacancies of

the attorney's office has led to a search, precedents have been found of informations filed by the solicitor-general in chancery, and on the law side of the exchequer. In this court the information against the earl of *Devonshire* * was prosecuted by the solicitor-general; and, though the enormity of the fine set, and the revolution of government which immediately followed, made this case the subject of much animadversion and just censure, "the solicitor-general having prosecuted was never objected. There are precedents of replying, demurring, taking issue, praying judgement or award of execution, by the solicitor-general during the vacancy of the other office. We all know, from our own experience, that, upon every vacancy which we remember of the attorney's place, his office has been executed by the solicitor-general; but it is said, "the information ought to have *suggested* that the office of attorney was vacant:" many of the precedents do not suggest it; and there can be no occasion. The attorney-general is a great officer of the law and of this court. The court take notice when the office is vacant, and by whom it is filled, when full; they give credit to the solicitor-general, when he sues as attorney for the king, "that he *has authority*;" he does it at his peril. In this case, before the defendant pleaded, the solicitor-general was made attorney, and in that capacity brought into court the information he had filed as solicitor. If an objection could lie to his authority as solicitor, the only question would be, "from what time the information should be considered as commenced, from the filing by the solicitor, or the bringing into court by the attorney;" and that could be of no consequence, but in respect of the time when the defendant ought to plead: but he has pleaded to the information brought in by the attorney-general, and been tried. In every light, and in every view, this objection is groundless; nothing has been offered to support it but serjeant *Heale's* case. Upon so plain a point, I certainly should not have said so much, but that the objection also goes in arrest of judgement, and therefore may be argued again. The counsel are apprized of my reasons: and, if they should think their objection tenable, I am open to conviction.

"Second objection, under the first error assigned, "that an outlawry does *not lie* upon an *information*."

* 3 Jac. II.

"The

“ The counsel for the defendant supported this objection *two* ways. First, they said, the books were silent on this head : and the *statute of additions* mentions only that, “ in original writs of personal actions, appeals, and *indictments*, in which the *Exigent* shall be awarded, &c. &c. * :” but an *information* is not therein mentioned. Secondly, they said, that from the *nature of the process*, in an information, *the Exigent was not awardable* ; for, the proceeding by information in this court is similar to the star-chamber precedents ; and, in such proceedings, they did not award a *capias*, but a *subpœna*. That here the antecedent process is by summons of *attachment*, not by *capias* ; and consequently, if there is no *capias* to introduce the process of *Exigent*, it cannot lie in this case. Serjeant Glynn admitted, as a point beyond all doubt, “ that informations of this kind were competent in this court at the *common law*.” No lawyer ever doubted of it ; no lawyer would seriously argue against it ; so that *Sir Bartholomew Shower* had no opportunity to deliver the argument he has printed †. Informations here neither derive their being, nor the form of proceeding upon them, from the star-chamber, but from the common law of the land, and the usage and practice of this country where they are exhibited. Although informations are not mentioned in the statute of additions, yet the same requisites of certainty and precision must be in an information as in an indictment ‡. Presentment is not mentioned in this statute ; and yet, on a presentment before the coroner, “ that *Frenche* was *felo de se*,” which was certified into the King’s Bench, “ and that certain of *Frenche’s* goods were in the possession of J. S.” process issued against J. S. until he was outlawed ; and upon error brought, “ for that there was not any addition given to the said J. S. in the presentment upon which he was outlawed,” it was at first doubted, “ whether upon that presentment process of outlawry did lie ;” and *Ive*, then clerk of the crown office, said to the court, “ that such process in such case did lie ; and that he could shew five hundred precedents of it.” And secondly it was moved, “ if this outlawry ought to be reversed for default of addition ;” but it was agreed by the whole court, that, as to this purpose, the presentment

* Vid. 1 Hen. V. c. 5. § 1.

† 1 Shower, 106, *Rex versus Berchet et alios*. *Prynn’s case*, 5 Mod. 459.

‡ 2 Hawkins, P. C. 260, 261.

should be accounted in law as an indictment *. To an information in nature of a *Quo Warranto*, to shew by what authority the defendant claimed to be a burghers of *Grampound*, the defendant pleaded in abatement, for want of proper addition, the information styling him a "labourer," whereas he was clothier; and this plea was moved to be set aside, on the ground, that an addition was not "necessary." The court refused to set it aside on that ground; but they found another, the want of a proper affidavit to verify the plea †. There seems as good ground to say, upon the foot of precedents, and construction of the statute of additions, "that process of outlawry lies, and addition is requisite in an information, as in the presentment in *Frenche's* case. As to the other argument from the nature of the process, there was no authority or precedent cited or produced to prove the assertion. On the contrary, there are many precedents where the process was by *Capias*, and the *Exigent* followed; some as in the present case, though most are before conviction; but "that a *Capias* does lie in process upon these informations," I take to be as old as their existence; if not, how could there have been such a number of outlawries upon informations; and some of antient date? All these records are so many authorities to support this process, which are not, after so great a length of unquestioned usage, to be now impeached ‡; and it is observable on the 18th of Edw. III. st. 1. that it not only clearly relates to a proceeding before judgement; but it gives the *Exigent*, if the party is not brought in on an *attachment* or *distress*. However, there is no need to resort to that kind of reasoning, when usage supports the *Capias*, in the present case, as the common process upon these occasions.

"Third objection, under the first error assigned, "that outlawry does not lie from the nature of the offence."

"This objection was slightly touched by Mr. Serjeant *Glynn*, but struck us at first as a point fit to be considered; and I mentioned to the bar, "that it might be proper to look into it." The doubt was, "Whether the offence charged in either of these informations was such as rendered the person accused of such crime liable to the process of outlawry, either at common law or by any statute. In *Coke, Littleton*, 128^b, it is said, that in the reign of king

* *Frenche's* case, Mich. 26 Eliz. 2 Leonard 200.

† The king against *Pardew*, H. 15 Geo. II. 1741.

‡ 5 Mod. 463, 464.

Alfred, and till a good while after the Conquest, no man could be outlawed, but for felony; the punishment whereof was death." But after, in *Bracton's* time, and somewhat before, process of outlawry was *ordained* to lie in all actions that were *Quare vi & armis*, which *Bracton* calls "*Delicta*"; for, there the king shall have a fine." The 18th Edw. III. ft. 1. declares the cases and offences for which the *Exigent* shall be awarded, if the party cannot be found, or brought in by attachment or distress, and not against any other. Also the 18th Edw. III. ft. 2. c. 5. says, "No *Exigent* shall from henceforth go out where a man is indicted of trespass, unless it be against the peace, or of things which be contained in the declaration made in that case at the last parliament." But, upon full consideration, I am very well satisfied that the counsel for the defendant judged right in laying no stress upon this objection. The offences laid in these informations, and the proceedings upon them, are at the *common law*. The *statutes* giving process of outlawry in certain cases, and restricting its issuing in others but under certain circumstances, do not affect the present question. The process is warranted in the present case by the *common law*, or not at all. *Actual* force or violence does not appear to be the criterion upon which the process of outlawry was founded. *The greatness of the crime, and the severity of the punishment*, seem to be the material circumstances originally attended to in founding this process, according to the passage I have just cited from *Coke* as to the earliest times; for, felony does not imply or convey the idea of actual outrage; grand larceny being, in its definition, as well as practice, different. And *Hawkins* confirms this notion, by saying, "that this process probably lay for all crimes of a higher nature * than trespass *vi & armis*."

The extension of this process is supposed by lord *Coke*, in the passage I quoted, (and what he says is repeated, without examination, by a variety of authors,) to have been somewhat before *Bracton's* time. The establishing that period for a supposed ordinance concerning outlawries strongly authenticates the testimony of that contemporary writer, touching the cases in which, and under what circumstances, this process lay. Lord *Coke* saw, that it was impossible to say "that outlawry did not lie for any crime under felony;" universal practice shewed the contrary. So he supposes a positive statute made about *Bracton's* time. There does not appear any particular or-

* 2 Hawkins, P. C. l. 2. c. 27, p. 302.

dinance for extending this process; and there is no authority for the supposition; but *Bracton*, who wrote in the reign of Henry III. says, “that it lay in *omni transgressione quæ fit contra pacem* *;” and afterwards, “*pro omni transgressione, licet minima, ubi quis ad pacem domini regis vocatus venire recusaverit, & hoc propter contumaciam.*” That this necessary ingredient “*contra pacem*” did not mean positive force in the committing of the offence, appears from the reason given, why it lay for felony, 2 Ro. Abr. 805. outlawry lay for felony; because it was *contra pacem*: for, that could not mean, as I have already said, more than its being an offence in its nature against the laws of society, and a disturbance of that good order and government which keeps a state in unity and peace. The crime of *larceny*, in its very nature, is secret and fraudulent, unless it be done with open violence, and then it is distinguished by the aggravated name of robbery. Besides, in the case of writs *Quare vi & armis*, in which cases this process is given, it is acknowledged to be on account of the *supposed*, not the actual, force; and so is the same place in 2 Ro. Abr. 805. and the 35th Hen. VI. 6^a and ^b, and many other books. In fact, therefore, it appears from *Bracton*, “that every offence committed against the peace subjected the delinquent to the process of outlawry;” and the cases shew, that the peace of the king is broke by disorders without force; and indeed some of the greatest crimes are without force. If force was the criterion on which this process of *Exigent* was founded at common law, why was that process given by the first † statute of *Edward* the Third in the case of *Riots*, &c. ? or what occasion had there been for the subsequent ‡ statute of *Edward* the Third, to say, “From henceforth it shall not issue in trespass, unless it is against the peace,” if the practice had not been upon indictments, though not so alleged, for process of *Exigent* to issue ? And that seems to be the true reason of the last restrictive statute. I don’t find that it ever was denied but that, upon a presentment or indictment for the king, process of outlawry lay; and so it is expressly said to be agreed in *Brooke*, title “*Exigent*,” which cites 8 Henry VI. || but a number of outlawries have been found in crimes laid to be *contra pacem*, without

* Lib. III. p. 127.

† 18 Edw. III. ft. 1.

‡ 18 Edw. III. ft. 2. c. 5.

|| Vid. Bro. Abr. title *Exigent et Capias*, pl. 29, and title *Process*, pl. 16.

vi & armis, and which could not be committed with force, and this error never assigned: which alone is decisive. I think Mr. Attorney-general produced one as far back as the fifth of *Edward the Fourth*.

The second error assigned is, as to the *proclamations*.

The return says, "I have caused public proclamation to be made *in manner and form as I am within commanded*." This is certainly *too loose*. The proclamations are not sufficiently set out for the court to judge whether they were properly made or not. I thought this error fatal; but Mr. *Thurlow* satisfied me, "that it was *unnecessary* to make *any proclamation at all*." The *statutes* which require proclamations do not extend to this case; and they are not required by the *common law*. Indeed this error was in a manner dropped, and given up by Serjeant *Glynn* upon his reply. He did not contend "that they were necessary." The present record, drawn in the Crown Office, and settled by king's counsel, shews under what obscurity and perplexity this matter lies; the result of ignorance in the practisers, and productive of a shameful confusion in the precedents of the office. They have not distinguished between *civil* and *criminal* outlawries. They have not distinguished between the manner of proceeding to outlaw in *criminal* cases *before* and *after* conviction; all is jumbled together. Whatever is required in *any* case they have applied to *all*. Circumstances are unnecessarily required, and defectively returned, because former mistakes are copied as precedents without examination; but, as the proclamations in this case were nugatory and superfluous, the imperfection of the return is of no consequence: it is no error.

Of the second *sort of errors, critical and verbal*, two are assigned; which were argued.

First. For that it is not shewn, nor does it appear by the return of the sheriff of *Middlesex*, "that the defendant was a first, second, third, fourth, and fifth time exacted *at the county court of the county of Middlesex*," as by the law of the land he ought to have been before he was outlawed.

Under this error, thus assigned, two objections were made; as to the first *exaction*, and as to the *subsequent*.

First. As to the first. The return is by two men, sheriff of *Middlesex*; "At my county-court, held," &c. so that two men making one officer, that is, *sheriff* of the county of *Middlesex*, say, "at my court, held in the county of *Middlesex*." To raise a doubt, it is necessary to go out of the record into history and law. We know from thence, that the same man might be sheriff of two counties. Till the 13th of Elizabeth one person was sheriff of

Somerset

Somerset and Dorsetshire; and so of *Sussex and Surrey*, of *Oxford and Berks*, of *Warwickshire and Leicestershire*; and to this day the same person is sheriff of *Cambridge and Huntingdonshire*. Such a sheriff might by law hold in either the county-court of the other. 6 Hen. VII. 15^b. In the case of the sheriff of *Somerset*, who was then also sheriff of *Dorsetshire*, "my court in the county of *Somerset*," was adjudged uncertain. 11 Hen. VII. 10^a. in a like case, *Rede Fairfax and Hussy* inclined to think it certain enough, and adjourned the consideration; but here it is impossible to raise a doubt, unless the sheriff of *Middlesex* may hold the court of another county in *Middlesex*. "At my county-court" can only be the county-court of *Middlesex*. Two men, sheriff of *Middlesex*, never were, nor could be, sheriff of any other county. The error is not assigned for want of any technical form of words, but "that it is not shewn, nor does it appear by the return;" whereas I am of opinion, it is shewn, and does appear by the return, that the county-court was of *Middlesex*, and could not possibly be the court of any other county.

Secondly. As to the subsequent exactions. The objection is, "that it is not shewn, nor does it appear, where the court was held, at which he was exacted." The return having specified the place where the court was held, at which he was first exacted, states severally the subsequent exactions, "at my court held at the same place." So that the whole doubt is, "whether the same place includes the description of the place referred to, which cannot be a doubt in the language of the world; for in truth the doubt can be no other than "whether the same place means the same place, that is, the place before described?"

Second critical error. The only other error assigned and argued is, "It is no where expressly shewn, that the place called *Brook Street*, where the several county-courts are supposed to have been held, is in the county of *Middlesex*." The return says, "At the house known by the sign of the Three Tons in *Brook Street* near *Holborn* in the county of *Middlesex*." The counsel for the defendant contend, that the true construction ought to be to apply "in the county of *Middlesex*," to *Holborn*, and not to *Brook Street*, and so make a stop at *Brook Street*. It is impossible for me to doubt, whether "near *Holborn*" is not part of the description of *Brook Street*: it could be added for no other reason: it could answer no end to say, "near *Holborn*," but as part of the name of this *Brook Street*, in contradistinction to some other *Brook Street*. It is immaterial what county *Holborn* is in; but the sheriff was bound to shew, that *Brook Street* was in *Middlesex*. There is no law in this; it is a question of construction. All men can judge of it, and

would treat with contempt the judgement of this sovereign court, if it could be founded upon so pitiful a prevarication. It is not permitted to me *to say* I doubt of the construction *unless* I *do* doubt, how much soever I may *wish* that this outlawry should *not* stand. I am of opinion, that, according to the letter, sense, and grammatical construction of the sentence, the court was held in "*Brook Street near Holborn*;" and that "*Brook Street near Holborn*" lies in the county of *Middlesex*; and I am persuaded there is no man who can think otherwise.

"These are the errors which have been objected; and *this* the manner and form in which they are assigned. For the reasons I have given, I cannot allow *any* of them. It was our duty, as well as our inclination, sedulously to consider, whether upon any *other* ground, or in any *other* light, we could find an informality which we might allow with satisfaction to our minds, and avow to the world.

"But here let me pause.

"It is fit to take some notice of the various terrors hung out; the numerous crowds which have attended, and now attend, in and about the hall, out of all reach of hearing what passes in court; and the tumults which in other places have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those *they call the people*, the judgement to be given *now*, and afterwards upon the *conviction*. Reasons of *policy* are urged, *from danger to the kingdom*, by commotions and general confusion.

"Give me leave to take the opportunity of this great and respectable audience to let the world know, *all such attempts* are vain. Unless we have been able to find an error which will bear us out to reverse the outlawry, it must be *affirmed*. The constitution does not allow reasons of state to influence *our* judgements. God forbid it should! We must not regard *political consequences*, how formidable soever they might be. If rebellion was the certain consequence, we are bound to say, "*Fiat justitia, ruat calum.*" The constitution trusts the *king* with reasons of state and policy: he may stop prosecutions; *he* may pardon offences; it is *his* to judge whether the law or the criminal should yield. *We* have *no election*. None of *us* encouraged or approved the *commission* of either of the crimes of which the defendant is convicted; none of us had any hand in his being *prosecuted*. As to *myself*, I took no part, in another place, in the addresses for that prosecution. *We* did not advise or assist the defendant to fly from justice; it was his *own* act,

act, and he must take the consequences. None of us have been consulted, or had any thing to do with the present prosecution. It is not in *our* power to stop it; it was not in *our* power to bring it on. *We* cannot pardon. We are to say what we take the law to be. If we do not speak our *real* opinions, we prevaricate with God and our own consciences.

I pass over many *anonymous* letters I have received. Those in *print* are public; and some of them have been brought judicially before the court. Whoever the writers are, they take the *wrong* way. I will do my duty *un-awed*. *What* am I to fear? That *mendax infamia* from the *press*, which daily coins *false facts* and *false motives*? The lies of *calumny* carry no terror to me. I trust that my temper of mind, and the colour and conduct of my life, have given me a suit of armour against *these* arrows. If, during this king's reign, I have ever supported his government, and assisted his measures, I have done it without any other reward than the consciousness of doing what I thought *right*. If I have ever opposed, I have done it upon the points themselves, without mixing in *party* or *faction*, and *without any collateral views*. I honor the king, and respect the people; but many things acquired by *the favor of either* are, in my account, objects *not worth ambition*.

"I wish *popularity*; but it is *that* popularity which *follows*, not that which is *run after*. It is that popularity which, sooner or later, never fails to do justice to the pursuit of *noble ends* by *noble means*. I will not *do* that which my conscience tells me is *wrong* upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press. I will not *avoid doing* what I *think is right*, though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, and upon an occasion, and under circumstances not unlike, "*Ego hoc animo semper fui, ut invidiam virtute partam; gloriam, non invidiam putarem.*"

"The threats go *farther than abuse*; *personal violence* is denounced. I do not believe it: it is not the genius of the worst of men of *this* country, in the worst of times: but I have set my mind at rest. The last end that can happen to any man never comes too soon, if he falls in support of the law and *liberty* of his country, for liberty is synonymous to law and government. Such a shock, too, might be productive of public good; it might awake the better part of the kingdom out of that lethargy, which seems to have be-

numbed them, and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety *.

“Once for all, let it be understood, “that no endeavours of *this kind* will influence *any* man who at present sits here.” If they had *any* effect, it would be *contrary* to their interest; leaning against their impression must give a bias the *other* way: but I hope, and I know, that I have fortitude enough to resist *even that* weakness. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not only the whole advantage he is intitled to from *substantial law and justice*, but *every* benefit, from the most critical nicety of *form*, which any other defendant could claim under the like *objection*. The only effect I feel, is an anxiety to be able to explain the grounds upon which we proceed, so as to satisfy all mankind, “that a flaw of form, given way to in *this* case, could *not* have been got over in *any other*.”

“From the precedents we have seen, it appears that a series of judgements have required a *technical form of words*, in the *description of the county-court* at which an outlaw is exacted: that after the words, “*at my county-court*” should be added the *name of the county*; and after the word “*beld*” should be added, “*for the county of,*” (naming it); whereas, here the sheriff says, “*at my county-court,*” without adding, “*of Middlesex;*” and he says, “*beld at the house, &c.*” without adding the words, “*for the county of Middlesex,*” after the word “*beld.*”

“As to the first expression, the cases begin as far back as the 7th of James the First; as to the second expression, they begin about the 18th of Charles the Second.

“If we are compelled by authority to look upon *either* expression as *technically necessary*, it is sufficient upon *this* occasion, because here both are wanting.

“If an outlawry be returned in this manner, “*ad com. meum tent. apud Cicestriam in comitatu Suffex, &c.*” it is erroneous; because it is not said, “*ad*

* A few sentences of this speech have been previously printed in pages 49, 50, and 51, of this work. The insertion of one of the most animated speeches that was ever delivered from the bench entire and unmutated is the best apology for the recapitulation of these few, yet important, sentences.

com. meum Suffex tentum, &c." *Alder* was outlawed for murder; and it was moved for error, that the sheriff returned, "*ad com. meum tentum apud D.* in the county of *Northumberland*," and did not say, "*ad com. meum Northumbriae tentum, &c.*;" and this was holden to be error, &c. Among the errors for which, the reporter says, the outlawry was reversed, the second is, not said "*Suffolciae*" after *com. meum*;" and this, he says, had been a common exception. Three copies have been left with us from the records, and they are "*ad com. meum Middlesex tent. &c.*" agreeable to the judgments I have mentioned. *Winnington* assigned error of outlawry; and one said to be allowed was, "that the court is said to be held in the county of *Hereford*," and doth not say for the "county." An outlawry was reversed, because it said, "*ad com. meum, &c.*" and not said, "*pro comitatu*." This term several outlawries were reversed for want of "*pro com.* or "*nec eorum aliquis*," or "*per judicium coronatorum*." One who was outlawed for the murder of *Sir Edmondbury Godfrey*, now brought a writ of error in his hand to the bar, praying, "that it might be read and allowed:" the outlawry was reversed. Among the errors assigned, one was, "that it did not appear the court was held *pro comitatu*;" the other was clearly a fatal objection. After stating the case, *Sir Bartholomew Shower* says: "he brings a writ of error to reverse the outlawry;" and the error which I assigned *ore tenus*, was the usual fault in not saying the county-court was held "*pro comitatu*;" the outlawry was reversed. This is a very strong authority to shew, that in the 3d of William and Mary it was settled "that the words *pro comitatu* were technically necessary. A record of an outlawry has been found, agreeable to this form established as necessary; and says, "*ad com. meum tent. pro com. Middlesex, apud le Cheshire-Cheese, in Gray's Inn Lane, in com. prædict.*"

"No case, report, or record, has been found since the 3d of queen *Anne*, which can be of any use either way, upon the point, or any of the errors assigned.

"The authorities I have stated, stand to this day uncontradicted: they are many, and have prevailed above a century: I think they began against law and reason: the former authorities were otherwise; the precedent in *Dalton* is otherwise. There is no reason for requiring these words, there is sufficient certainty without them. It is impossible to doubt upon this record, but that the county-court, at which the defendant was exacted, was the court of, and held for, the county of *Middlesex*: but this is a criminal

case.

case highly penal. Outlaws have had the benefit of this exception for a great length of time. *Can* we refuse it to the defendant? We *cannot*; Though I am clearly of opinion, "there was not a colour *originally* to hold these words to be necessary. The objection to the blunder between the peace "of the *now*," and "the *late* king*," after conviction, has not much more solidity in it; yet the House of Lords thought themselves bound by precedents; and so must we, had the flaw been discovered before judgment. I *cannot* say, "that it does *not appear* upon this record, that the court was *of*, and held *for*, the county of *Middlesex*;" because I am clearly of opinion, "that most manifestly it *does*." But I *can* say, that a series of authorities, unimpeached and uncontradicted from the 7th of *James* the First as to one expression, and from the 18th of *Charles* the Second as to the other, have said, "such words are *formally necessary*." I *can* say, that *such authority*, though begun without law, reason, or common sense, *ought to avail the defendant*. It would be dangerous to say, that any exception *allowed so long* should now be over-ruled. The exception certainly would not have prevailed, had it been opposed at first; but before the 3d of queen *Anne*, there being no opposition after a writ of error was granted, the court considered the crown as consenting to the reversal upon *any* pretence how slight soever: though that is *not* the case *now*, the necessity of the form of words must not be canvassed; since it has been *so often adjudged* necessary, the officers of the crown are in fault, for not attending to the form prescribed, and copying the precedent of *King versus Bell*.

"There can no mischief or uncertainty arise from this determination, because it being once known "what form of words is necessary," it is easy to follow it: but great suspicion and uncertainty must follow, from this court's *allowing* a formal exception one day, and *disallowing* it another.

"I beg to be understood, that I ground my opinion *singly upon the authority of the cases adjudged*, which, as they are on the *favorable* side, in a *criminal* case, *highly penal*, I think ought not to be departed from: and therefore I am bound to say that, *for want of these technical words*, the outlawry ought to be *reversed*."

* Vide Lookup's case.

A rule was accordingly made (in each cause) "that the out-lawry be *reversed*."

On the same 8th of June, 1768, rules were made, for the prosecutor to shew cause (upon *Tuesday* then next) why the judgement should not be arrested, and why the verdict should not be set aside.

And also a rule for now remanding the defendant to the custody of the marshal, and for bringing him into court again on *Tuesday* next.

Accordingly, on *Tuesday* the 14th of June, 1768, the two following points were argued very strenuously and very copiously on both sides; namely, "whether the informations could be exhibited by the *solicitor-general*; and whether the amendment could be made by a *single judge out of court*, in the manner before specified." The former was objected to as a ground for arresting the judgement: the latter as a ground for a new trial.

Lord Mansfield, as to the motion in arrest of judgement, adhered to the opinion, he had before given, "that the informations were *well* exhibited by the *solicitor-general*."

As to the motion for a new trial on account of the amendment, he *declared* his satisfaction at the motion's having been made, and the matter so fully discussed and understood. "Matters of *practice*, he observed, are not to be known from *books*." What passes at a judge's chambers is matter of *tradition*: it rests in *memory*. In cases of this kind, judges must inquire of their officers: this is done in court every day, when the practice is disputed or doubted: it is in its nature official. The officers are better acquainted with it than the judges. For his own part, neither his education, nor his walk in life before he came into this court, ever led him into any knowledge of the practice of orders made by judges in the vacation. The making this order for the amendment appeared to him to be right, and to be a matter of course. It came to him as a matter of course, and re-

commended as such from a gentleman of *great experience*, who (he knew) would have as soon have cut off his right hand as have deceived him, by representing this *as* a thing of course when it was not so. Accordingly he issued a summons “to shew cause why the amendment should not be made.” A summons always issues before a judge makes an order: a summons therefore went out of course. Upon the attendance, his lordship asked Mr. *Hughes* (an old and experienced officer), the defendant’s clerk in court, “whether there was any doubt but that this was amendable.” He very rightly, and as was his duty, *admitted* that it *was* amendable, and that he “could not say otherwise.” His lordship then took down a book, in which were entered some cases where informations were amended by a judge’s order just before trial; and, after reading one or two, Mr. *Philips*, the defendant’s attorney, desired him not to give himself any farther trouble. Mr. *Philips* said indeed, that he *could not consent to it*, but he did not object to it nor *contradict it*; nor was it objected to *at the trial*. The counsel *saw* that there could be no objection made to the order.

The principles of *toleration* were ably and fully discussed by lord Mansfield, in a case respecting a Quaker’s testimony on his *affirmation* being admissible, in an action of debt on statute 2 George II. c. 24. against *bribery*.

Lord *Mansfield*. “When this case was argued before, I was desirous, for many reasons, that the question should be very fully considered, all the cases looked into, and solemnly argued again. I think it of the utmost importance; that all the consequences of the act of toleration should be pursued with the greatest liberality, in ease of the scrupulous consciences of Dissenters on the one hand; but so as those scruples of conscience should not be prejudicial to the rest of the king’s subjects: for, a scruple of conscience entitles a party to indulgence and protection, so far as not to suffer for it; but it is of consequence that the subject should not suffer too.

“I have

“ I have been furnished with a great number of cases, which have passed in this court, upon motions for attachments and other collateral matters, wherein the affirmations of Quakers have been refused. But these seem all to have arisen from the hasty decision of a case of *Hinton versus Byron*, 11 William III. (cited in *Rex versus Bell*,) where, on a motion for an attachment, the affidavit in support of the application was by a quaker on his affirmation. Barely upon that, the attachment was objected to, and not a word was said in support of it; but for a good reason: the moment the objection was made, the Quaker took the oath, or was ready to have taken it, and so the objection was not insisted on. And yet it is remarkable, that the memory of these cases has run through all the rest, introduced very great confusion, and not one of the authorities seems to have been argued or considered upon the act of parliament itself: but the present is not a case of that sort. This is the case of evidence offered at a trial in open court.

“ This sect sprang up during the troubles, and was found at the Restoration, with many other sects of Non-conformists equally scrupulous. At that time, the law considered their scruples of conscience as a crime; and therefore they were not allowed to be set up as an excuse or justification of another offence. Therefore, when a quaker, who was subpoenaed to give evidence, absented himself, and an attachment issued in consequence of it, he could not in excuse say, that his conscience prevented him from giving evidence; for, that was a crime. So in the case of interrogatories: the consequence was, he was obliged to answer, or be committed to prison; and, if his obstinacy continued, he lay there for life.

“ The experience of eight and twenty years, from the Restoration to the time of the Revolution, shewed, that this obstinacy was not merely a pretence or colour given to right or wrong; but that it was a *scruple*, and that the sect was ready to go through all kind of suffering in the pertinacious adherence to it.

“ A more liberal way of thinking prevailed after the Revolution. The principles of toleration were explained and justified, in consequence of the writings of *Mr. Locke*, *lord Somers*, and other great men of those times: and a statute passed, which, though not general, was very extensive in the relief it afforded to scrupulous consciences. The statute was 1 William and Mary, c. 18, commonly called the *toleration act*.

“ In the *tenth* section of that statute, the legislature takes notice, that there was a sect called *Quakers*, who had religious principles, in which they

differed from the established doctrine of the church of *England*; and that one of their religious scruples was the taking an oath according to the form prescribed by the law of England to Christians; and therefore the act enables them to give assurance of their fidelity and allegiance to the state by, what I may call, *another form of oath*; because it is appealing to the Deity for the veracity of what they shall say, and invoking his vengeance if they utter what is false. This statute was followed about six years after by another statute, 7 and 8 William III. c. 34. which allows a *Quaker* to affirm in cases where *other persons* are required to take an *oath*. But, though the legislature had taken notice that they ought not to be punished, so far as barely their own opinion and scruples went, yet they did not extend the indulgence so as to let it operate in prejudice to the rights of other persons. It is much that even at that time they were not permitted to give evidence in this form in all cases whatsoever. (I will state the reason of it by and bye.) It has been truly said, that since the case of *Omichund versus Barker*, and another case of great authority determined since, the nature of an appeal to heaven, which ought to be received as a full sanction to evidence, has been more fully understood. I therefore argued, and the judges in delivering their opinions agreed, that, upon the principles of the common law, there is no particular form essential to an oath to be taken by a witness: but, as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most. Therefore, though the Christian oath was settled in very early times, yet *Jews* before the 18th of Edward I. when they were expelled the kingdom, were permitted to give evidence at common law; and were sworn, not on the Evangelists, but on the Old Testament. No distinction was taken between their swearing in a civil or criminal case.

“ Since the case of *Omichund versus Barker*, a question was referred to all the judges of *England*, whether a *Turk* should be permitted to swear on the *Alcoran* in a prosecution for a capital offence at the *Old Bailey*; and they were all unanimously of opinion that he might.

“ It is objected, that the *Quakers* are the only people in the world who ever refused to *swear*; but in *substance* their affirmation is the same thing, the *form* only is different; for an affirmation is a most solemn appeal and attestation to God of the truth.

“ There is a remarkable case reported in 2d Sid. VI. where *Dr. Owen*, vice-chancellor of *Oxford*, in the year 1657, being called as a witness, refused

fused to kiss the book, but desired it might be opened before him, and he lifted up his right hand. The jury prayed the opinion of the court, if they ought to give the same credit to him as to a witness sworn in the usual manner; and Glynn, chief justice, told them, that, in his opinion, he had taken as strong an oath as any other witness; "but," said he, "if I were to be sworn, I would kiss the book."

"There is a sect in *Scotland*, who hold it to be idolatry at this day to kiss the book; but their own form of swearing is much more solemn. At *Carlisle*, in the year 1745, upon a prosecution of some of the rebels, there was no evidence but of this sect, who would not kiss the book; and a case was sent up for advice, whether they should be received as witnesses. It was the opinion of those who were consulted here, that the evidence might be received; but it was not an object, and the prosecution went no farther.

"With regard to the exception of the testimony of Quakers in *criminal prosecutions*, it was occasioned by a strong prejudice in the minds of the great men who passed the statute 7 and 8 William III. c. 34. I have looked into the debates of those days, and find, that every step and clause of the act was fought hard in the House of Commons, and carried by small majorities. I know not whether the exception came in by way of amendment, but I think it did. It was first a temporary act for *seven* years only. By stat. 13 Will. III. c. 4. it was continued for *eleven* years; and in the year 1713 there was an application to the House of Commons to make it *perpetual*; but it was rejected. An application was afterwards made to the House of Lords, who passed the bill; and it went down to the House of Commons, but they would not even give it a first reading. The whole history of the act may be seen in a very correct work, which never received the author's finishing hand; I mean, Doctor *Swift's* Four last Years of Queen Anne; and it is observable, that Doctor *Swift* commends the House of Commons for the opposition they gave to the act.

"On the accession of the present family to the throne, it was made perpetual by stat. 1 Geo. I. st. 2. c. 6. but the exception still remained in criminal cases or criminal causes; and it is extraordinary, that though many alterations were made in it by stat. 8 George I. c. 6. yet no variation was made as to this particular, which, in some instances, bears hard upon the Quakers, and leaves them in a worse condition than they were when this sect first arose;

arose; for, before the stat. 7 and 8 Will. III. c. 34, if a Quaker were indicted for a capital offence he might call Quakers as witnesses in his defence, and that without oath; for formerly the prisoner's witnesses were not sworn; but now by stat. 1 Anne, st. 2. c. 9. sect. 3. all persons examined in criminal cases must be examined on oath, both for and against the crown; therefore, if a Quaker be indicted, he cannot have the benefit of a Quaker's testimony. It is not possible to say why the exception was made; but it is made, and must be followed.

“The effect, however, is, that it is an exception not to be extended by equity. In remedial cases, the construction of statutes is extended to other cases within the reason or rule of them; but where it is a hard positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction.

“We come then to this question, Is the present a *criminal cause*? A Quaker appears, and offers himself as a witness; can he give evidence without being sworn? If it is a *criminal case*, he must be sworn, or he cannot give evidence.

“Now there is no distinction better known than the distinction between *civil* and *criminal law*, or between *criminal prosecutions* and *civil actions*.

“Mr. Justice *Blackstone*, and all modern and antient writers upon the subject distinguish between them. *Penal* actions were never yet put under the head of criminal law or crimes. The construction of the statute must be extended by equity to make this a *criminal cause*. It is as much a civil action as an action for *money had and received*. The legislature, when they excepted to the evidence of Quakers in *criminal* causes, must be understood to mean causes technically criminal; and a different construction would not only be injurious to Quakers, but prejudicial to the rest of the king's subjects who may want their testimony. The case mentioned by Mr. Rooke, of Sir Watkyn Williams Wynne *versus* Middleton, is a very full authority, and alone sufficient to warrant the distinction between civil and criminal proceedings. In that case the question was, whether the statute 7 and 8 William III. c. 7. was penal or remedial; the court held, “it was not a penal statute; but, suppose it was to be considered as a penal statute, yet it was also a *remedial law*, and therefore the objection taken was cured by stat. 16 and 17 Car. II. c. 8.” Now the words of exception in that statute, and also in stat. 32 Henry VIII. c. 30. and in statute 18 Eliz. c. 14. are “penal actions and criminal proceedings;” but lord chief justice Willes,

Willes, in delivering the solemn judgement of the court, says, there is another act, which would decide of itself, if considered in the light of a new law, or as an interpretation of what was meant by penal actions in the stat. 16 and 17 Car. II. c. 8. This is the statute of *Jeofails*, 4 George II. c. 26. for turning all law proceedings into *English*; and it has this remarkable conclusion, "that every statute of *jeofails* shall extend to all *forms and proceedings in English*, except in criminal cases, and that this clause shall be construed in the most beneficial manner." This is very decisive.

"No authority whatever has been mentioned on the other side, nor case cited, where it has been held that a *penal* action is a criminal case; and perhaps the point was never before doubted. The single authority mentioned against receiving the evidence of the Quaker in this case is an appeal of murder; but that is only a different mode of prosecuting an offender to death. Instead of proceeding by indictment in the usual way, it allows the relation to carry on the prosecution for the purpose of attaining the same end which the king's prosecution would have had if the offender had been convicted, *viz. execution*; and therefore the writers on the law of *England* class an appeal of murder in the books under the head of Criminal Cases.

"With regard to cases that have been cited as happening here, it is astonishing that it ever should have been doubted after the act of toleration, and after the stat. 7 and 8 William III. c. 34. when an attachment was moved for against a Quaker, whether or not he should be at liberty to give an answer on his solemn affirmation, without being obliged to take an oath; but it is true, that it was doubted three times in lord Hardwicke's time, and never resolved; for the court avoided the question by discharging the rule upon some other matter. I consider it, that as to his own answers, he is a good witness; for, after the act of toleration, it was settled in the case of Sir *Thomas Harrison*, chamberlain of the city of London, *versus Evans*, pursuant to the opinion of all the judges, except one, that a dissenter from the church of *England* is not guilty of a *crime*, *barely* by having that *religious opinion*.

"Quakers therefore, since that act, are not, in the eye of the law, guilty of a crime, by saying, that, sincerely, they cannot swear according to our form of oath. It is a fair excuse for them, and a reason for dispensing with the usual form; otherwise, by reason of their scruples, they would be imprisoned for life; for you cannot take their answer upon interrogatories.

"Neither

“Neither of the acts dispense with a Quaker’s giving evidence in a criminal case; and an attachment will go upon refusal: but he might now say, the toleration acts indemnify me, and take notice of my scruples.

“It is remarkable, that the statute 7 and 8 William III. c. 34. in the first section, gives Quakers a right to affirm in all cases whatever where another man may take an oath. This is general, and it is inserted by way of *exception* only, that he shall not be admitted in a *criminal cause*. It is a purgation of himself, not giving evidence when he is to answer interrogatories.

“In the case of *Rex versus Turner*, on a motion to quash an appointment of overseers, the court said, though the prosecution is in the king’s name, the *end* of it is a *civil remedy*; and very properly allowed the Quaker’s affirmation to be read.

“It is extraordinary that, upon all the cases of attachment, not one was argued upon the ground of its being a *criminal* case; and to be sure the exception might as well hold on an affirmation taken to hold bail, because it deprives a man of his liberty. The very last attachment for non-performance of an award was obtained in this court upon a Quaker’s affirmation, and not a word said by way of objection to it. That was the case of *Taylor versus Scott*.

“We are not under the least embarrassment in the present case; for there is not a single authority to prove that, upon a penal action, a Quaker’s evidence may not be received upon his affirmation; therefore I am of opinion, that Mr. Justice Nares did perfectly right in admitting this Quaker to be a witness upon his affirmation; and, consequently, that the rule for a new trial should be discharged.”

Another instance of lord Mansfield’s sense of toleration in matters of religion arose on the trial of Mr. James Webb, the 25th of June, 1768, at Westminster, at the suit of Payne, a carpenter, and the common informer of that period of time.

Lord Mansfield. “Gentlemen of the jury, the material articles of this trial may be reduced to two heads. First, whether or not the defendant is a priest? and, secondly, whether or not he has said mass? for, I look upon the mass as the only material charge in this trial; for that is properly

properly the only act they allege which is peculiar to the Popish clergy. As for those things they have sworn they saw him do, they are nothing but what might be done by any one; at most they are no proofs that he is a priest. By the statute of Queen Elizabeth 27, c. 2. it is high-treason for any man who is proved to be a priest, to breathe in this kingdom. Another statute was made afterwards more mild, that only imposed a fine and short imprisonment; and this statute of king William condemns any priest convicted of exercising his functions to perpetual imprisonment; but in examining those statutes we have all agreed, that is, all the twelve judges have agreed, that, "*before any man can be proceeded against, so as to convict him, it is first necessary that he be proved to be a priest;*" for, the statute says, "if any one apprehends a Popish bishop, priest, or jesuit, and convict him of saying mass;" so that it is not sufficient to convict a person on those statutes for saying mass, unless he is first proved to be a priest; therefore the issue of the whole does not depend upon the saying mass; wherefore I shall leave it to your consideration, whether the evidence given of his saying mass be a sufficient argument to prove him to be a priest? You will be pleased to observe, that there is but one evidence to prove it. Payne is the only man who has sworn that he said mass; and this Payne is a very illiterate man; knows nothing of Latin, the language in which mass is said; and moreover, he is an evidence in his own cause; because, if Payne convicts him, he is entitled to a hundred pounds reward. No one ought to be an evidence in his own cause, though this is sometimes allowed of, as in cases of highwaymen and the like: however, it is a consideration that I need not take notice of, as he is the only evidence; for, several others were called, and not one of them would venture to swear that they saw James Webb say mass. One swore he saw him sprinkle with holy-water; another, that he said some prayers to the Virgin Mary in English; another, that he heard him preach; and being asked what he preached about? he said, he taught the people, that *good works were necessary for salvation*; and he looked upon that not to be the doctrine of the Protestant religion. Gentlemen, I will leave that to your consideration. In short, none of those evidences are any thing to the case in question. As for preaching, laymen often perform that; at least a deacon may do it in the Church of Rome. A deacon may even administer the sacraments, and perform a great many of their services; and we do not know, but that he may elevate the host: at least, I do not know but he may;

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and I am persuaded you know nothing about it. Now, if a deacon may perform all those things Payne saw the defendant do; they are no proofs that he is a priest; therefore, I propose to give it up to the jury in this light; and shall consider the saying mass as a material charge, which I shall leave to their consideration, whether the evidence of his saying mass sufficiently proves him, first of all, to be a priest? and, secondly, whether it proves that he has said mass? You will be pleased to observe, that the charge before you is quite different from that which lately happened in Surrey; there the defendant confessed himself to be a priest.

Sir Fletcher Norton. "My lord, we had his own hand-writing, which said, I am a priest of such an order."

Lord Mansfield. "I did not know that. I thought he had only acknowledged it. That was still stronger against him; but, gentlemen, you will be pleased to observe, that nothing of this appears against Mr. Webb. He has neither owned it, nor has any thing been produced to prove it, as there are no proofs of his ordination; which must be before he can be proved to be a priest: therefore, if it should be proved that he has said mass, this will not convict him of being a priest, as appears evidently from the example his counsel has brought of a person who had no ordination at all, and yet said mass; but, as that person was not a priest, and therefore could not be condemned by those statutes; so neither can the defendant, before there are sufficient proofs of his ordination.

"This Payne, having got a hundred pounds since the conviction of that man in Surrey, and being now in hopes of more money, swears positively that the defendant said mass; and you see what pains he has taken, running here and there, sometimes to the ambassador's to see how they performed there, and then stealing in privately where he thought he might lay an information to get another hundred pounds. Though according to the penal statutes of queen Elizabeth, which are still in force, it is high-treason for a priest to come into England; but the informer is entitled to no reward. There are three statutes against priests. The first is that of queen Elizabeth 27, c. 2. which makes it high-treason for them to come into England; but Payne has not indicted him upon that statute, because, if he had been convicted, he would have had no reward. There was another made afterwards, enacting, that, if a priest was convicted of saying mass, he was to forfeit two hundred marks, and suffer one year's imprisonment; but neither does Payne go upon this.

this statute, for here there is no reward for the informer. The third was made in king William's reign, 11 and 12, c. 4. soon after the Revolution. This is the statute Payne aims at, because here is one hundred pounds the county is to pay him, if he can convict the defendant.

“In the beginning of the Protestant religion, in order to establish it, they thought it in some manner necessary to enact these penal laws; for then the pope had great power, and they thought they could not take too effectual means to prevent him exercising any part of it in these dominions; and the Jesuits were then a very formidable body; and, apprehending great danger from them, knowing their close connections with the pope, the penal laws were chiefly designed against them. But now the case is quite altered. The pope has very little power, which seems to grow less and less daily. As for the Jesuits, they are now banished out of most kingdoms in Europe, so that there is now nothing to fear from either of these quarters, and consequently no necessity of enforcing these laws; neither was it ever the design of the legislators to have these laws enforced by every common informer; but only at proper times and seasons, when they saw a necessity for it, and by proper persons appointed by themselves for that purpose; and yet, more properly speaking, they were never designed to be enforced at all, but were only made *in terrorem*. Now, when you have considered all these things, and reflected that there is only one evidence, only Payne, and that all he has sworn to is only saying mass; I shall leave it to your consideration, whether the evidence given by this one only witness be sufficient to convict James Webb, first, of his being a priest, and, secondly, of his exercising priestly functions; that is, whether or not he has said mass? for, I look upon that as the only material thing he is charged with, and the only thing that comes under your consideration; but take notice, if you bring him in guilty, the punishment is very severe, a dreadful punishment indeed! nothing less than a perpetual imprisonment! so that, if you have the least doubt, you ought by no means to bring him in guilty. Nothing but the clearest evidence ought to condemn a man to such a grievous punishment. Be pleased therefore to consult together, and when you have agreed bring in the verdict.”

Acquitted.

In Easter Term, 1768*, the court of King's Bench had occasion to consider the nature of a bond which *operated in damages* in case the defendant married any other person than the plaintiff; and the discussion thereof by the chief justice cannot fail to be interesting to the curious reader, since it allows the competency of the parties to measure the quantum of damages, although it discountenances bonds and agreements which operate in restraint of marriage.

“ Lord Mansfield stated the deed particularly, and the declaration upon it. The words are: “ I do hereby promise Mrs. Catharine Lowe that I will not marry with any person *besides herself*; if I do, I agree to pay the said Catharine Lowe one thousand pounds within three months, &c.” The defendant was single at the time; and so was the plaintiff.

“ The second count avers that the plaintiff was ready to marry him; and that, after the making the deed, he did marry another woman, namely, one Elizabeth Gardiner: yet he the defendant *did not*, when requested by the plaintiff, *pay the thousand pounds* which he had agreed to pay; and so (though often requested) hath *not kept the covenant* made between them as aforesaid; so that the *breach* is assigned in the *not paying* the thousand pounds.

“ To this declaration, “ *non est factum*” was pleaded by the defendant: but the jury found “ that it *was* his deed, and have given one thousand pounds damages; and by law, and in justice, he ought to *pay the thousand pounds*. Money is the *measure of value*; therefore *what else* could the jury find but this thousand pounds (unless they had also given interest after the three months)?

“ This is *not* an action brought against him for *not marrying her*, or for *his marrying any one else*: the *non-payment of the one thousand pounds* is the ground of this action—“ that he did not, when requested, *pay the one thousand pounds*.”

“ This money was payable upon a contingency; and the contingency has happened: therefore it ought to be paid.

* 4 Burr. 2228. Catharine Lowe against Newsham Peers.

“ There

“ There is a difference between covenants *in general*, and covenants *secured by a penalty or forfeiture*. In the *latter* case the obligee has his election. He may *either* bring an action of debt for the penalty, and recover the *penalty* (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole); *or, if* he does *not* choose to go for the penalty, he may proceed upon the *covenant*, and recover *more or less* than the penalty, *toties quoties*.

“ And upon *this distinction* they proceed in Courts of *Equity*. They will *relieve against a penalty* upon a *compensation*: but, where the covenant is “ to pay a particular *liquidated sum*,” a Court of Equity can *not* make a *new* covenant for a man; nor is there any *room* for *compensation* or *relief*: as in leases containing a *covenant against ploughing up meadow*; if the covenant be “ not to plough,” and there be a *penalty*, a Court of Equity will *relieve against the penalty*, or will even go farther than that (to preserve the *substance* of the agreement): but, if it is worded “ to pay *five pounds an acre for every acre ploughed up*,” there is *no alternative*, *no room for any relief* against it, *no compensation*; it is the *substance* of the agreement. Here the specified sum of one thousand pounds is found in damages; it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore *the proper quantum* of the damages.

“ The same reason answers to the motion for a new trial in the present case.

“ As to the case mentioned by Mr. Mansfield, from 2 Ro. Abr. 703*, it is impossible to support it; for, it cannot be that a man should be *obliged to take less* than the liquidated sum; and the writ of error in that case was plainly brought by the *defendant* †: besides, the *damages* could never be taken advantage of upon a writ of error. How could the *quantum* of damages, found by the *jury*, be the *subject* of a *writ of error*?

“ ’Tis therefore clear, that where the precise sum is *not* the *essence* of the agreement, the *quantum* of the damages may be assessed by the jury: but, where the *precise* sum is *fixed and agreed upon* between the parties, that *very* sum is the ascertained damage, and the jury are *confined* to it.

* Sir Baptist Hickes *versus* Goates.

† It was so, vide S. C. very clearly reported, in Cro. Jac. 390. Sir Baptist. Hickes *versus* Goates.

“ This

“ This brings the matter to the *validity* of the deed.

“ Whatever grounds existed at *that* time, that could avail the defendant to avoid the deed, should have come on *his* part, by a proper *plea*, if it would in reality have been a *good* defence for him: and therefore, if *any* such ground had existed in *this* case, as did exist in *Shepley's* case *, or any other ground *not* appearing upon the face of the deed, it ought to have been avoided by a proper *plea*. Here we are upon the face of the deed: the plea is “ *non est factum*.”

“ It is objected, that this is an engagement *in restraint of marriage*.

“ It is answered, that this construction is directly contrary to the words and intention of the deed, which amounts to a mutual agreement between these two persons “ *to marry* each other;” and that the plaintiff's acceptance of the deed proves that; and that what the jury have found is a sufficient reason to have it supposed that there was such mutual agreement “ *to marry each other*.” That, however, this is, at the utmost, only a contract that he would not marry any other woman; and that, if he should marry any other woman, he would pay the plaintiff one thousand pounds within three months “ after he should so marry any other woman;” but is very far from restraining his marrying *at all*.

“ This is a point of very considerable importance. All these contracts ought to be looked upon (as lord *Hardwicke* said in the case of *Woodhouse versus Shepley*) with a *jealous eye*; even supposing them clear of any direct fraud. In *that* case, lord *Hardwicke* did not proceed on any circumstances of particular actual fraud; but on public and general considerations; and therefore he gave no costs.

“ These engagements are liable to many mischiefs, to many dangerous consequences.

“ When persons of different sexes, attached to each other, and thus contracting to marry each other, do not marry immediately, there is always *some* reason or other against it, as disapprobation of friends and relations, inequality of circumstances or the like. Both sides ought to *continue free*: otherwise such contracts may be greatly abused; as by putting women's virtue in danger by too much confidence in men; or by young men living with

* 2 *Atkyns*, 535. *Woodhouse versus Shepley*, *et c. contra*.

women without being married: therefore these contracts are *not* to be *extended* by implication.

“ But here is not the least ground to say “ that this man has engaged to marry *this* woman.” Much less does any thing appear of *her* engaging to marry *him*.

“ There is a great difference between promising to marry a *particular person*, and promising *not* to marry *any one else*. There is no colour for *either* of these constructions that have been offered by the plaintiff's counsel.

“ This is only a restraint upon him against marrying *any one else* besides the plaintiff; not a reciprocal engagement “ to marry each other,” or any thing like it.

“ This penalty is set up against the defendant, after ten years have passed without any intercourse between the plaintiff and him.

“ Another reason why we should not *strain* in *favor* of this contract is, because, *if* there was *really* any *mutual* contract under fair and equal circumstances, the plaintiff will *still* be *at liberty* to *bring her action*: for, a *void* bond can never stand in her way.

“ Therefore I think that what passed at the the trial was perfectly right; that the measure of damages was the thousand pounds, and that this was such a contract as ought not to be carried into execution.

“ The case of *Baker and White* * was not near so strong as the present case: that was in restraint of *Elizabeth Baker's* marrying *again*. There is a difference between a restraint of a *first* marriage, and a restraint of a *second* marriage: the plaintiff there was a *widow* when she gave the bond; and the transaction was, in effect, a mere wager, and nothing at all unfair in it: and yet, in that case, the bond was decreed to be delivered up to be cancelled.”

To relieve the reader's attention a little from the consideration of legal determinations, the interposition of, or resort to, a few well-authenticated incidents in life may not be displeasing or unprofitable to the jurisperit in his researches in common life, or in cultivating a proper knowledge of mankind.

* 2 Vern. 215. *Baker et Ux. versus White et alios.*

Lord Mansfield was in the habits of intimacy with bishop Trevor, who being much indisposed, lord Mansfield called to see him; and while he was in the room with the bishop's secretary for a minute, the late Dr. Addington, his physician, was brought in a chair by two able-bodied chairmen, who were proceeding to carry him up stairs, pale and wan, and much debilitated, to his patient. The bishop's secretary, fearing that his lord would be low-spirited at such a scene, begged of lord Mansfield to interpose and go up first. The quickness of the reply could not fail to be treasured up; it was, "By no means; let him go; you know nothing of human nature; the bishop will be put in good spirits on seeing any one in a worse condition than himself." Lord Mansfield was prophetic; and, on Dr. Addington's taking leave, the chairmen had no sooner quitted the room with the sick-fare than the bishop humourously said, "I fear the crows will soon have my excellent physician:" but in this he was mistaken. Bishop Trevor died in a few weeks. Dr. Addington lived many years after he had been consigned to the crows by his princely patient the bishop of Durham.

Another instance of his knowledge of mankind occurred when the public opinion was much agitated, and every one formed his own, as to the propriety of prosecuting Mr. *Wilkes*. In conversation with some friends, lord Mansfield said, "I am decidedly against the prosecution. His consequence will die away if you will let him alone; but, by public notice of him, you will increase his consequence; the very thing he covets, and has in full view."

The security and good government of the *island of Jamaica* depending in a great degree on the due exercise of martial law, or from other motives of sound policy, the fact is incontrovertible, that in a *military officer* are often united the high officers of *governor-general* and *chancellor*.

A general

A *General Officer*, who was very diffident of his ability to decide properly, by intuition, as it were, in a *Court of Equity*, applied to lord Mansfield for advice, who answered: "General, you have a sound head, and a good heart; take courage, and you will do very well, in your new occupation, in a Court of Equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; *but be careful not to assign your reasons*, since your determinations may be substantially right, although your reasons may be very bad, or essentially wrong."

If common fame may be credited on this occasion, it is said, that, as soon as the learned counsel had finished their arguments, the chancellor (in his *military capacity*) ordered the drums to beat a few minutes, the music of which drove, as he was pleased to say, a great deal of the law-arguments out of his head, and enabled him the better, in the capacity of chancellor, to decide with firmness, and form his own decree. Be that as it may, the probability of the fact, as well as of the effect of a noise, seems to acquire additional strength by a modern anecdote. A very dignified legal character in this country, distinguished not only for sterling sense, but also for effusions of wit and pleasantry, when a famous case of appeal was determined *in dom. procerum* against his decree, in stepping into his coach, ordered his coachmen to drive *fast* over the stones; adding aside to his officers, "the noise will drive all disagreeable ideas out of my head." The plan succeeded very well till an old woman, at the crossing into St. Martin's Lane, occasioned the coachman humanely to stop. The lord keeper, wondering at the cause, ordered his *purse-bearer* to ask the coachman why he drew up, who replied, "I know my master would not have me kill the poor old woman. She is almost under the horses feet." The lord keeper, finding she was not any longer in danger, wittily replied,

B b

plied, "Suppose he had killed her—take her to the House of Lords, and they will *undo* all we had done."

Again, lord Mansfield is said to have given wholesome and pithy advice to a friend who was prevailed on to act in the commission of the peace: "Keep your reasons within your own breast; be not too hasty in common cases of granting *warrants*, before you have tried the effect of a *summons*; and, above all, be careful that good *intentions* are the governing principle, since we generally judge of the intentions of a magistrate."

The late Mr. Madan, who, about the year 1756, changed his bar-gown for a clerical one, having written a pamphlet, wherein he arraigned the mistaken lenity of the judges in too frequently reprieving capital offenders, was present, either as a magistrate or one of the grand jury, at the assizes held at East Grinstead in Sussex, some years ago, which proved to be a maiden one. On the sheriff expressing his happiness in presenting the white gloves to his lordship, as the emblem of purity, the chief justice pleasantly observed, "Mr. Madan too will have a singular pleasure on this occasion, because there is no condemned prisoner to be reprieved."

Many other apophthegms stand upon record; but the pleasantry of conversation loses considerably by being narrated or detailed; and possibly ease and pleasantry of this nature may not be deemed to be within the line of duty of a biographer, whose province is, to relate what he has heard and seen with *accuracy* and *fidelity*, and to introduce effusions of wit, for the very useful purpose intended by nature, that of recommending and adorning truth.

In a great commercial country, every speech and determination of lord Mansfield's, tending to discriminate between legal and illegal acts done by persons subject to the bankrupt-laws, when they were on the eve, as it were, of actual bankruptcy, must be interesting to all who have any concern in, or connection with, the extensive affairs of commerce, or the numerous compli-

complicated links which form a chain of strong and useful arguments in favor of *bond fide* creditors on the one hand, and the promotion of substantial justice on the other*.

Lord Mansfield. "This is an action of Trover, brought by the assignees of Laroche and Willing, for a note of six hundred pounds; and there is a verdict for the plaintiff upon the following case.

"The bankrupts, upon the 7th of November, 1766, indorsed the note in question, which is in the following words: "London, 10th of October, 1766, six hundred pound. Two months after date we promise to pay to Messieurs Laroche and Willing, or order, six hundred pounds, value received;" and is signed by Bryer and Everard. The note is indorsed by the bankrupts to the defendant, to whom they were *indebted to a larger amount*; and was sent to him in a letter directed to *Trowbridge*, which was carried to the post that morning, and was *received* on the 10th, and could not be received before.

"The bankrupts have given Bryer and Everard two notes for three hundred pounds each, which had *not* been discharged.

"Laroche and Willing committed several acts of bankrupt on the 8th.

"The note was so indorsed, and sent to the defendant by the bankrupts, in contemplation of *their insolvency and bankruptcy*.

"Upon this case the question is, "if the plaintiff ought to recover."

"And it is material to observe a great deal that is not stated in it. First, there *never was any course of dealing* between the bankrupts and the defendant, by way of indorsing or sending notes to each other. The next thing is, that the *letter*, in which the note was sent, is *suppressed by the defendant*. It is not found "that the note was indorsed *in payment of any debt*:" it is only said, "he was a creditor to a larger amount." It is not said, whether it was to be received *at the risque of Temple*, or only *as agent of the bankrupts*; but the letter, which was in the power of the defendant, was not produced; and so the case stands *without any appropriation* of the note. The case is silent in these particulars, and very materially so.

* Anderson and others, assignees, against Temple, 4 Burr. 2238, Trinity Term, 1768.

“It is found, “that Bryer and Everard were creditors of the bankrupts, to just the same amount, for two other notes they had taken in exchange;” and “that those two notes were *not discharged*.”

“The only question I make is, “whether, under the circumstances of this case, the indorsing and sending this note to the defendant is fraudulent, and void *as such*.”

“And I choose to put the case upon *that* ground, because the most desirable object in *all* judicial determinations, especially in *mercantile* ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, *to do* substantial justice: and therefore I will avoid laying the stress that might properly be laid upon the *assent* being necessary to *complete* the contract, or the *want of a delivery*; the solid ground of which is, that a contract shall be presumed complete upon any distinction where the justice of the case requires it, though there is no *actual* delivery. And it is settled, “that if a man sends bills of exchange, or consigns a cargo; and the person to whom he sends them *has paid the value before*; though he did not know of the sending them at that time, the sending of them to the carrier will be *sufficient to prevent the assignees* from taking these goods back, in case of an intervening act of bankruptcy: but if goods or bills of exchange are sent, and the consideration has not been received, the court of Chancery always interposes; and there are numbers of adjudged cases of that kind, in Chancery. In the case in Strange*, there is no doubt but the honesty of the case inclined the court to the judgement they gave: the *reason given* turns upon a subtilty. The court of Chancery, in that case, would have interposed, and said, “the assignees should not have the goods without paying the price.” I think the determination was right; and there was an actual delivery to a person who became a trustee: but a post-boy is not a trustee. I think the case was well supported upon other grounds than those mentioned in the book.

“I ground my opinion upon *this*, “whether the indorsement *be fraudulent*.” And as to that, it is certain that the statutes of bankruptcy leave a trader, to the moment of an act of bankruptcy committed, every power an owner can have over his estate. The statute says†, *fraudulent conveyances*

* Atkins *versus* Barwick, v. I. Sir J. Strange, 165.

† Vide 1 Jac. I. c. 15. § 2.

shall be an act of Bankruptcy;" *other* acts that are fraudulent are not made acts of bankruptcy: but they are attended with the consequences of fraud, *at law*; which is, "that fraud renders *every act void*."

"All acts to defraud creditors or the public laws of the land are *void*: and if the nature of the act be a *conveyance* or *grant*, 'tis not only void, but an *act of bankruptcy*."

"It has been determined "that a conveyance by a trader, of *all* his effects, for the payment of one or more *bond fide* creditors of the most meritorious kind, though his effects do not amount to half what is due, is *void*; because it is *not* an act in the *ordinary course* of business; it is not such an act as a man could do, but it must be followed by an immediate act of bankruptcy, and it is defeating the *equality* that is introduced by the statutes of bankruptcy, and the criminal (for the bankrupt is considered as a criminal) is taking upon himself to prefer whom he pleases." But suppose he *leaves out* a considerable part of his effects: if it appears to be *only colourable*, that don't vary the case; it is fraudulent. Suppose a trader makes a conveyance of *all* his estate for the payment of all his creditors *except one*, (which was the case of *Gayner** cited in *Dematto's* case), it is void. Suppose it was, "to pay *all his creditors rateably*:" if there were no assent of his creditors, or composition, it would be void: for, it would be rescinding the whole system of the bankrupt laws, and, instead of applying to the great seal, he would choose his own trustees. If this is a *fraudulent* act, it is *void*."

"A general question has been started, "whether in *any* case, upon the eve of a bankruptcy, a man may do that which in consequence prefers a particular creditor:" and that has been argued as a *general* question."

"But that will depend upon the *act*, as, if a bankrupt, in course of payment, pays a creditor; this is a fair advantage in the course of trade: or, if a creditor threatens legal diligence, and there is no collusion, or begins to sue a debtor; and he makes an assignment of part of his goods; it is a fair transaction, and what a man might do without having any bankruptcy in view. Suppose such a case as *Small and Oudley*†; there it was for the advantage of the creditors, and no fraud to them; and, if part of the trans-

* Vide 4 Burr. p. 477.

† Vide 4 Burr. p. 480.

action were set aside as fraudulent, the whole must; but it never entered into the mind of any judge to say, "that a man *in contemplation* of an act of bankruptcy could sit down and dispose of all his effects to the use of *different* creditors;" for that would be a fraud upon the acts of bankruptcy; but, if done *in a course of trade*, and *not fraudulent*, it may be supported.

"This was *not* done in a *course of trade*; for there never was any dealing between the parties in sending indorsed notes. There was *no application* made by the defendant; and it was done with a view to positive iniquity; for, the bankrupts had received this note from *Bryer* and *Everard* for notes of the same value; and, knowing they should become bankrupts the next day, to defeat *Bryer* and *Everard* of setting off their notes against it, indorse this note to another person. And there was no way of doing justice to *Bryer* and *Everard* but by supporting the claim now made by the assignees; so that there was express particular *fraud* at the time the fact was done. Next, it is an act that is most certainly *not complete* as between the parties. The argument in the case of *Scott* * is very applicable to the present; for, there was a preference given to a *bona fide* creditor; but he knew nothing of it. Suppose, in the course of trade, a bill is sent to *Constantinople*, and a bankruptcy happens in *England* before it arrives, yet it may be good; but here it is done, because they were resolved to commit an act of bankruptcy."

The three other judges agreed, "that an assent is necessary to *complete* every contract; that in the present case the defendant had his election till the 10th of November; that the act of bankruptcy being committed on the 8th, the contract was incomplete; and that, upon the whole circumstances taken together, the transaction was fraudulent and void."

1769.

Few questions have been more frequently agitated, or more elaborately argued with all the acumen and ingenuity of the bar, than the question which arose in the case of *Perrin and Blake*, determined in Michaelmas term 1769, in the court of King's Bench, viz. whether the devisee in a will of *Mr. Williams*, the

* Vid. 4 Burr. p. 2174.

owner of a plantation in Jamaica, took an estate for life, or an estate-tail, under the following devise.

William Williams, by his will, after giving portions to his three daughters, disposes of his temporal estate in manner following :

“ It is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his life ; and to that intent I give, devise, and bequeath, all the rest and residue of my estate to my son John Williams, and any son my wife may be enseinte of at my death, for and during the term of their natural lives, the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said son John Williams and the said infant ; the remainder to the heirs of the bodies of my said son John Williams and the said infant, lawfully begotten, or to be begotten, the remainder to my daughters for and during the term of their natural lives, equally to be divided between them ; the remainder to my said brother-in-law, Isaac Gale, during the natural lives of my said daughters respectively, the remainder to the heirs of the bodies of my said daughters, equally to be divided between them : and I do declare it to be my will and pleasure, that the share or part of any of my said daughters that shall happen to die shall immediately vest in the heirs of her body in manner aforesaid.”

The devise first assumed a questionable shape in this country upon an appeal, in nature of a writ of error, to the king in council from a judgement of one of the courts in Jamaica.

Mr. Justice Blackstone, in his first volume of Reports, 672. states the question in Perrin and Blake as coming on upon a special verdict, whereas it came before the court of King's Bench, on a demurrer to a replication.

The short history of the proceedings in that case is this, according to Mr. Douglas's accurate account of it in his Reports, 329.

“ An ejectment was brought in Jamaica, where the estate lay, and a special verdict found, which came over for the opinion of the privy council upon an appeal in the nature of a writ of error. Lord *Mansfield*, the only law-lord who then attended the council, knowing the several opinions which had

had been taken, and considering the question as a point of general tendency, which might affect titles to real property in *England*, was unwilling that judgement should be given in the *Cockpit* merely on his opinion; and therefore proposed, with the consent and concurrence of the counsel on both sides, that the appeal should be adjourned, and in the mean time a solemn opinion taken in *Westminster Hall*. At first it was agreed to state a case for the opinion of the court of King's Bench, which might have been adjourned on account of difficulty into the *Exchequer Chamber*; but a case from the king in his judicial capacity being new, it was afterwards thought better that the point should be brought before the court upon the pleadings in a feigned action of trespass. *Walker*, serjeant, settled the record for that purpose, on which, to a declaration in trespass (*laid in Middlesex* under a *videlicet*) the defendant *pleaded* the will. The plaintiff *replied* the recovery, on the ground that the son took an estate-tail; and to this replication the defendant *demurred*."

In Easter and Trinity terms, 9th of his present Majesty, the case was fully argued and re-argued, infomuch as to induce the lord chief justice to observe, that no diligence, no ingenuity, could make any addition to the arguments.

In Michaelmas term in the same year, the court of King's Bench gave their judgement, that the devisee took, according to the intention of the testator, only an estate for life; in which opinion the Chief, together with Mr. Justice Aston and Mr. Justice Willes, concurred; but Mr. Justice Yates was of a contrary opinion, and thought he took an estate-tail.

The ingenious and elaborate display of law-learning by the most eminent counsel employed in the cause, and the discriminations made by the judges in their separate opinions, as well as the forcible reasons which occurred to each of them, are too extensive for a work of this nature. They contain no less than forty pages in a modern collection, entitled, *Collectanea Juridica*, consisting of Tracts relative to the Law and Constitution of England; to which the jurisperit is respectfully referred, since he alone is most likely to receive pleasure from, and to profit by, the reference.

In a case of so much doubt and difficulty as the present case, the greatest impartiality on the part of a biographer seems to be essentially necessary; and, as a lover of truth, he humbly conceives, that it would be an act of injustice to the memory of lord Mansfield to omit stating any material fact, or leading feature; and particularly that, after the first argument, his lordship was not only very desirous of the case being argued again, but also that, after it had been solemnly determined by the court of King's Bench, it should be finally determined by the highest authority.

Accordingly, after the first argument, the lord chief justice observed,

“ It is very fit that this matter should be argued again, and all the cases reconsidered. There is a long string of them in the books; but there is a great diversity of opinions. It should be considered, that the different temper of the times may have occasioned considerable difference; and the want of due attention to this has occasioned the courts to run into many absurd distinctions, which had now better be forgotten. The chancellors have in their decrees made many distinctions, particularly between the trust and legal estate; and indeed even in the trusts, between trusts executory and executed: neither of these distinctions are founded in sense. As to the first, courts of equity are bounden by a general rule of law, as much as a court of common law. As to the second, all trusts are executory. It is absolutely necessary to the very existence of a trust, that it be executory, because a trust executed is within the Statute of Uses. This lord Hardwicke particularly remarks in the case of *Bagshaw and Spencer*: but upon the questions that have arisen in common law there have been many subtilties. In *King and Melling*, lord Hale mentions a case wherein a person gives an estate to another for life, & *non aliter*; and upon this ground it was ruled an estate for life. So there is *Backhouse and Wells*, and many others. These refinements should be all absorbed by enquiring, on the present occasion, whether the testator's intention is the sovereign guide; or whether the legal sense of certain technical expressions is to controul that intention, when it appears that he has unwarily and ignorantly used them? That question resolved, will finally decide

decide this matter; and I am therefore very desirous of having it argued and determined by us, and after us by the highest authority."

The case stood over for judgement from May 2, 1769, to Feb. 8th, 1770. Hil. 10. Geo. III; when the judges delivered their opinions *seriatim*.

The speech of lord chief justice Mansfield.

"The subject is exhausted; and therefore I shall content myself with giving my judgement without giving my reasons, except it be just to remark upon a few general propositions, in which I entirely concur with my brothers Aston and Willes, whose arguments I read over before I came here.

"I have served many apprenticeships to this case. I argued Coulson and Coulson. It was upon my argument that Mr. Verney made the case. I argued Bagshaw and Spencer in every stage of it. I gave three opinions upon this very will; and I have determined Robinson and Robinson, and Long and Laming; and I think now at this instant just as I did above thirty years ago. I always thought, and herein I agree with my brothers, that, as the law had allowed a free communication of intention to the testator, it would be a strange law to say, "Now you have communicated that intention so as every body understands what you mean; yet, because you have used a certain expression of art, we will cross your intention, and give your will a different construction; though what you mean to have done is perfectly legal, and the only reason for contravening you is, because you have not expressed yourself as a lawyer." My examination of this question always has, and, I believe, ever will convince me, that the legal intention, when clearly explained, is to controul the legal sense of a term of art unwarily used by the testator.

"It is true, in Shelley's case, the rule is laid down as stated to-day; but that rule can never affect this question. The real sense and meaning of that rule was this: "*if the testator gave an estate for life only to A. remainder to the heirs of A's body.*" If the court had said *A.* is only tenant for life, there would have been a contingent remainder to his issue, and then the issue would have been liable to be barred by any forfeiture of the tenant for life; and if he made an estate *pur autre vie*, the remainder was gone: so that the best way of complying with the intention was to give him an estate tail,
by

by which means the issue were protected by the statute *de donis*; and if you gave an estate only for life, as it could have no use in the world but to cheat the lord of the feudal services, the law very prudently said, that in such cases it should be an estate tail.

“ This rule is clear law, but is not a general proposition, subject to no controul, as where a testator’s intention was manifestly on the other side, and where the objections might be answered. I find no cases in Brooke or Fitzherbert where these matters have come in question; so that we are agreed that the intention is to govern, and that Shelley’s case does not constitute a decisive uncontrollable rule. This being settled, the question is, Whether in this case he has so explained his intention as to controul the technical expressions? and I agree with my brothers, that he has. We know that the invention of trustees to support contingent remainders is usually attributed to Bridgman and Palmer since the Restoration: then, knowing that these estates might be limited in strict settlement, it is sufficient for the judges if it appears that the testator (however he has explained himself) had a strict settlement in his eye; so that, from what was said, and from the whole of the will, I concur that the intention of the testator was lawful, and such as may be now supported. If the intent be doubtful, if it be against law, the legal import of the words must govern: but here there cannot be a doubt; the heirs of John Williams’s body are to take as purchasers successively.

“ In Shaw and Weigh, in Goodright and Pullynn, the whole went upon the interpretation; and lord Raymond says, “ *Legal words shall not be broken through for the sake of ambiguous expressions.*” The words here are not strong enough; and so lord Hobart, who was contemporary with lord Coke, says, “ *No man shall shew me a case where heirs have taken as purchasers without declaration plain.*” What is the natural inference from hence? That, if the words be not ambiguous, or if the declaration be plain, the legal sense of the words must yield.

“ Robinson and Robinson was penned upon its own circumstances, to avoid shaking Backhouse and Wells, and the other cases; and what lord chief baron Parker said arose upon lord Hardwicke’s doubts; he wished to make it a strict settlement in Launcelot Hicks, but was very much averse to shaking any prior determinations: so that, upon these grounds, that the intention must govern, that the intention is manifest, and that Shelley’s case is no universal proposition, I must agree with my brothers Aston and Willes.

But upon these general observations I should not content myself, if any case can be found establishing a contrary doctrine; which leads me to say, that I agree with them, that there is no place which contravenes this general doctrine.

“It is true, a great reliance has been made on *Coulson and Coulson*, and every argument has been used for the support of it; but this case is a very different one from *Coulson and Coulson*. That case may stand; and if ever any future litigation should arise upon a question exactly similar to that, I shall submit to *Coulson and Coulson*; though, if I was sitting in judgement upon that very will, my determination should have been different. It has been said, “that this case is law was the unanimous opinion of the courts, is a respectable authority, and always was deemed such.” I cannot think so. *Dennison* certainly did not agree with his brothers at first; but, however, as he found them strenuously against him, he was very willing to acquiesce upon the certificate being signed.

“Lord Hardwicke, speaking of *Coulson and Coulson*, confines it exactly within its own bounds; and farther says, “*if that case be law*,” which was a great deal for him to say; and so little satisfied with it was he, that the last thing he did in Chancery was to send Sayer and Masterman here; and he told me he did it to have *Coulson and Coulson* reconsidered. That case of Sayer and Masterman has been mentioned very often; it was a different case, and has nothing to do with the present. But, admitting it to be law, and admitting that it shall ever stand, I cannot see that it is applicable to the present case, here are such strong marks of intention. But it was said, that the conveyancers had rested upon *Coulson and Coulson*; and I know who was meant: but it is impossible that where a man meant to give an estate tail to another, he would give it him for life, remainder to trustees to support contingent remainders, remainder to the heirs of his body; it is trifling with words to suppose it.

“There is yet a fifth proposition, in which I have a great deal of experience, and wherein I perfectly agree with my brothers; and it is, that there is no sound distinction between the devise of a legal estate, and of a trust; and between an executory trust and one executed: all trusts are executory; and in every shape that a will appears, the intention must govern.

“I admit that there is a devise to John Williams for life, and in the same will a devise to the heirs of his body; and I agree that this is within the letter of Shelley’s case; and I do not doubt but there are, and have been
always,

always, lawyers of a different bent of genius, and different course of education, who have chosen to adhere to the strict letter of law; and they will say, that Shelley's case is uncontrollable authority, and they will make a difference between trusts and legal estates, to the harrassing of a suitor; for, great are the doubts frequently which is or is not a trust; and the searching for the representative of the trustee is attended with inconvenience, trouble, and expence. And if courts of law will adhere to the mere letter of law, the great men who preside in chancery will ever devise new ways to creep out of the lines of law, and tamper with equity. This is certain, from the proceedings on the statute of uses, which will render the lines of property very dubious and uncertain, by difference in judgement in law and equity, to the much-dreaded introduction of uncertainty in landed property, and confusion in the titles of the owners.

“My opinion therefore is, that the intention being clear, beyond doubt, to give an estate for life to John Williams, and an inheritance successively to be taken by the heirs of his body; and that his intention, being consistent with the rules of law, should be complied with, in contradiction to the legal sense of the words used by the testator so unguardedly and ignorantly; and as the defendant claims under such settlement; I am of opinion that she is entitled to the judgement of the court; and as my brother Yates stands alone, judgement must be so given for the defendant.”

It is somewhat curious to observe, that a diversity of opinion in one of the four very eminent counsel who were consulted previous to the commencement of any suit on the legal operation of the devise in this will, as will be shewn by and by, probably gave rise to this very long and expensive suit; and it is equally probable, that the different opinion of one very upright and able judge in the King's Bench out of four, encouraged the devisee to bring a writ of error in the Exchequer chamber, where he ultimately prevailed.

The opinions of the twelve judges were, in the progress of this cause, thus divided:

In

In support of the intention of the testator, and an estate for life.

Lord chief justice Mansfield.

Mr. Justice Willes.

Lord chief justice De Grey.

Mr. Baron Smythe, afterwards

Mr. Justice Aston.

lord chief baron.

In favor of legal authorities and an estate-tail.

Lord chief baron Parker.

Mr. Baron Perrot.

Mr. Justice Yates.

Mr. Justice Blackstone.

Baron Adams.

Mr. Justice Nares.

Mr. Justice Gould.

Under these circumstances, and in this situation, the scales of justice almost *in equilibrio*, we find a serious discussion and investigation of this point in a treatise or essay of great learning and ingenuity, published about this period, by a young barrister, who is now no more.—*De mortuis nil nisi justum!*

The author must now intreat the reader to lend his patience, while he endeavours to elucidate the consistency and impartial conduct of the earl of Mansfield in every stage of this important case; and to point out the different lights and shades in which it appeared to some persons of high rank in this country, who deemed themselves to be interested in the event of the cause.

William Williams died the 4th of February, 1723, leaving issue one son named John Williams, and three daughters, Bonetta, Hannah, and Anne, and his wife not *enseinte*.

The estate-tail which John Williams was supposed to have taken under the will was endeavoured to be barred by a lease and release inrolled in the secretary's office, according to the local law of the island of Jamaica.

The

The following preliminary stricture in Mr. Fearne's essay was very proper to introduce all the other leading features of a curious legal portrait:

“The case of Perrin and Blake seemed to over-rule and supersede all authorities and precedents, and to assume the air of an authoritative repeal of all former opinions and resolutions upon the same point *.”

In discussing the distinctions taken by former judges † in the case of Leonard and the Earl of Suffex, by lord Talbot in Glenorchy and Bosville ‡, and by lord Hardwicke in Bagshaw and Spencer ||, the conclusion drawn by Mr. Fearne is,

“But, notwithstanding all this, the stronger discernment of the court of King's Bench, in the case of Perrin and Blake, told them, that those distinctions were too refined and nugatory, and ought now to be abolished, however they might have suited the narrow strictness of preceding times; and though it is true, that these very distinctions had hitherto been received and adopted even by a court of equity itself, it was nevertheless impossible to reconcile them, in any degree, with that enlarged and more enlightened style of doctrine, which, at this period, so eminently distinguished the decisions of the court of King's Bench. Nothing therefore remained, but to explode these old illiberal distinctions by some solemn resolution directly in point; and accordingly the court of King's Bench adjudged, that J. Williams took only an estate for life under the devise in question.

“It is true, indeed, that the late judge Yates, a very respectable authority, who then filled a seat on that bench, opposed the decision with great depth of learning and solidity of argument; but unfortunately his arguments were drawn from sources much too *antiquated* to meet with the attention,

* Vid. p. 111. Essay on Contingent Remainders.

† Vid. 2 Vern. 256.

‡ Cases temp. Talbot, 19.

|| 2 Atk. 581, and 1 Vez. 149.

which many people conversant in these matters are even still so old-fashioned as to think they merited."

So far Mr. Fearne proceeded in the first sketch he attempted to draw in the case of Perrin and Blake.

The discussion of the case of Coulson and Coulson opens another battery, still more formidable, which appears, as it were, masked, in the following note introduced by the Essayist:

"The reader, most probably, will think the determination in the case of Coulson and Coulson was sufficient to have closed the question, and removed all ground for any farther disputes upon the same point; and indeed both the bench and the bar seem to have acquiesced in this opinion, till the judgement of the court of King's Bench, in the case of Perrin and Blake, ripped up the matter again, and opened new sources of uncertainty, dispute, and litigation, by reducing the point to a *discretionary* construction. That the Bench in general considered the case of Coulson and Coulson as a ruling authority appears, as well by the decision in the subsequent case of Sayer and Masterman as by the reversal, in the court of Exchequer-chamber, of the judgement given by the court of King's Bench in the case of Perrin and Blake; and that the same opinion influenced the bar in general I am induced to believe, as well from the sentiments I have heard many eminent counsel express in regard to the matter as from the perusal I have been favored with of what I am told are the copies of the opinions of several of the greatest lawyers of the age, whose names it appears those copies bear; and which opinions, I am informed, as the copies themselves indeed import, were given upon the same devise, which was the subject of the question in the case of Perrin and Blake. *All these opinions*, if the copies which I have seen speak true, *concur in giving an estate-tail to J. Williams*. Among these copies I have seen some of an opinion, which, if really given by the great person to whom it is ascribed, and whose name the copies bear, cannot be mentioned without the utmost respect; for, it is said to have been given by the present chief justice of the court of King's Bench, he being then his majesty's solicitor-general; and therefore I dare not assume the liberty of communicating the purport of this opinion to the reader in any more compendious terms than the very words of the copies which I have seen, which are as follow: Upon the

the authority of the late determination in Coulson and Coulson, though I am aware how far the expression here differs from that case, I think the remainder to the heirs of the body of John will operate as a limitation to him in tail, which, by a recovery properly suffered, he might dock.

10th April, 1747.

W. MURRAY."

The earl of Mansfield, conceiving that the opinion which Mr. Fearne had thus ascribed to him under the signature of W. Murray was not the *real opinion* which he gave us as one of the *four* counsel, who were consulted on the occasion, an opinion which was deeply impressed and even rivetted on his mind, not only from his having differed in opinion with the other very eminent counsel viz. Mr. Attorney-general Rider, and Messrs. Filmer and Booth, but also from the celebrity of the case, and the great attention paid to it on its first appearance in a course of litigation in this country, took occasion in Easter term 1780, in the case of *Hodgson and Ux. versus Ambrose**, to disavow the opinion ascribed to him in the copy adduced by Mr. Fearne. On this occasion it may be proper to observe, that, in addition to the great respect due to an open disavowal in a public court by so discerning and so great a judge, it did not seem to require a large portion of credulity in the audience to induce them, *undâ voce*, to ascribe their assent to the disavowal; since, unless there was some difference in opinion among the four very eminent lawyers who, in or about 1747, were consulted on the devise in this will, was it not contrary to general usage, and bordering upon Quixotism, to institute a long and most expensive suit? The plaintiff must be desperate indeed, and devoid of human prudence, who, upon application to the greatest lawyers in this kingdom, finds a perfect coincidence of opinion against him, and yet is weak and

* Vid. Douglas's Reports, 323.

perverse enough to institute a very expensive suit. It is clear to demonstration, that the opinions of Sir Dudley Rider, then attorney-general, and of Messrs. Filmer and Booth were, that Mr. Williams took an estate tail. It remains to be discussed, whether his majesty's then solicitor-general, Mr. Murray, was not of a different opinion; the discussion of which cannot fail to discover the deep recesses where truth lies, or, at the least, whether the weight of evidence in support of a different opinion does not greatly preponderate against the opinion ascribed to him by Mr. Fearne, who (in his address to the earl of Mansfield, published in the same year, 1780, under the title of "Copies of Opinions ascribed to eminent Counsel on the Will which was the subject of the Case of Perrin and Blake before the Court of King's Bench in 1769,") returns to the charge, and candidly acknowledges, that he was possessed of some volumes of the late Mr. Booth's opinions in manuscript, which he did him the honor to present him with, and among which was found the copy of the opinion of the 10th of April, 1747.

The earl of Mansfield patiently travelled through fifteen pages of this address, and smiled at the following conclusion, "I trust, my lord, no man is, or can be culpable, for not reckoning on a *possibility* that betrays all grounds of belief, and starts into *fact* under the veil of *incredibility*. Such an event may serve indeed, my lord, as a caution to the world, against too implicit a credit to the most authoritative of human asseverations."

However lamentable or humiliating it may be to humanity, the fact is not to be controverted, that it is not always the lot of fine parts, to be blest with a retentive memory. The late Mr. Booth, in an advanced age, in a great degree deprived of the blessing of sight, and at the distance of more than twenty years, in a private conversation, or even in a private opinion, in the year 1770, might have had no recollection of his being possessed of another opinion of his majesty's then solicitor-general, which mi-
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litated against an estate tail, and which did not consist of a mere *ipse dixit*, but wherein an *authority* was cited in *support of an estate for life*? In justice to the memory of this eminent and elevated character, the author thinks himself under the necessity of avowing, that the copy of a very different opinion from that mentioned by Mr. Fearne by way of answer to the first query on the will of Mr. Williams was found and examined in the presence of several of Mr. Booth's executors, of whom the author has the honor to be one, among his papers a few days after his decease, of which the following is a faithful copy :

“ I think John Williams under the will of his father was entitled only to an estate for life, either in the real or personal estate. Whether he took a remainder in tail in the real estate after a limitation to Gale, or whether the heirs of his body were to take as purchasers, may admit of great doubt; but I incline to think the heirs of his body ought to be construed words of purchase; and I ground by opinion upon the declaration with which the whole devise is introduced, which seems as strong as the words *for life only* in the case of Backhouse and Wells.

31 Jan. 1746.

W. MURRAY.”

The reader is now in possession of the true ground of lord Mansfield's *disavowal* of the former opinion suggested to have been given by him. The lord chief justice on this occasion seems to have greater reason to complain of the treatment he received, than the great and witty Erasmus had to complain of the Franciscan monk, who altered his opinion of a work of Erasmus's on account of a single word. Erasmus, in this work, derided the superstition of those who desired to be buried in the frock of a *Franciscan* or a *Dominican*, and pleasantly draws this conclusion: If I had only *jested* upon the coat of *Dominic*, I should have been a good Christian with the *Franciscan*; but for one word I became a *heretic*. To be serious. The judicious reader, who is now in possession of the true ground of lord Mansfield's open *disavowal* of an erroneous opinion, may fairly ask, what weight

ought any private opinion to have in judicial determinations? what influence on the merits of the case? The answer is obvious: A private opinion ought to be as light as a feather in the scale of justice. The author will now beg permission briefly to consider the peculiar circumstances, and the merits of the case.

The great outlines of intention appear to be strongly marked by the testator, who not only declares, that it was his intent and meaning that none of his children should sell or dispose of his estate for longer time than his life; and in order to effectuate that intention, he devises his estate, and points out one essential part of the duty of his trustees, that of preserving the contingent remainders to his children, which he meant to create; but, alas! either from the circumstance of his being *inops concilii*, he has not effectually devised the *legal estate* to the trustees on the one hand; or, for the sake of brevity on the other, instead of naming the first and other sons in succession, he has adopted the familiar phrase of *heirs of the body* of his son William Williams, which concise mode of expression would, however, have been very effectual if the legal estate of freehold for the life of William Williams had been devised to the trustee, as in the case of Shapland and Smith in Brown's Reports, p. 75, or if by any accident the legal estate of inheritance had been outstanding in a trustee; but inasmuch as the testator's intention had not the aid of either of these supporters, a long train of legal decisions put in their claim to make the evidence of intention inconsistent with, and subservient to, the rules which govern devises of the *legal estate*, so as to enlarge the estate of the first taker to an estate tail, by reason that every devisee of the legal estate, who, in the same will, has an estate given to him for life, with a remainder *mediate* or *immediate*, to the heirs of his body shall, according to the rule in Shelley's case be deemed to take an estate tail; *mediate* when there is the intervention of trustees in the will to preserve

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contingent remainders ; and *immediate*, when the legal devise is destitute of such aid. Since, unless contingent remainders to the children of the devisee, in succession or otherwise, in a strict course of in-tail, are introduced, this receipt, as it has been emphatically called by a very able judge, the late lord chief justice Wilmot, for keeping an estate in a family fails, and falls to the ground, in regard that the law, in this instance, discovers and determines, that there are not any contingent remainders to be preserved.

It is to be lamented, says the earl of Mansfield in another case, that questions of this kind have occasioned so much litigation and expence. The best way to settle them is to reduce the matter, *if possible*, to some certain rules. Of the same opinion was the late lord chief justice Wilmot, in whom were found the rare endowments of quick penetration and sound judgement, who, sitting as one of the lords commissioners of the great seal in 1757, in the introductory sentence to a very able opinion, seemed to commiserate, with great propriety, the difficulty of any counsel giving an opinion to be depended upon in a case like the present.

His words were, "The question upon the construction of wills, whether a person takes an estate for life or in tail, has been very much agitated, and yet remains so much undetermined, that a counsel must still find it very difficult to give an opinion that may be depended upon ; and I think it would have been of great service to the public, and tended to render property less precarious and uncertain, if the legal construction of words in a will had never been departed from ; for, it must be much better that every person's intent should be subservient to the rules of law, than the rules of law should serve the party's intent."

But the difficulty of reducing them to certain rules still recurs, and has, according to the opinion of a late law lord, lord Grantley,

Grantley, whose extensive knowlege and great practice made him a very competent judge, cost the different suitors of the courts in thirty years an immense sum of money; and he farther added, the nice distinctions which were necessary to be put into the scale, to try whether the weighty arguments of intention in favor of an estate for life, or the more weighty decisions in former cases, should preponderate in favor of an estate tail, were generally founded on such superficial reasoning, as to leave the matter in a greater state of uncertainty, in proportion to the greater sum spent in litigation. If Erasmus had lived in those days, he would probably have altered his opinion, and preferred the study of law to that of physic.

Adversus inopiam certissimum præsidium est ars medicandi, quæ longissimè abest à necessitate mendicandi—huic proxima est jurisprudentia."

The good policy, the great and noble system, however, of adhering to established decisions, which are strengthened not only by their numbers, but also by that very hand which weakens and destroys all other fabrics, *the hand of time*, may be exemplified in the following real instance, nearly concomitant with, and coëval to, the case of Perrin and Blake.

The late Mr. Booth, who, being placed in the light of a conveyancer, was *nulli secundus*, previous to the judgement given by the court of King's Bench in 1769, was professionally called upon to give his opinion on the title to an estate in Suffex agreed to be purchased by his grace the duke of Richmond. The sole point in the title was, whether the vender, who conceived himself to be tenant in tail, and who had suffered a recovery, had good right so to do? Mr. Booth, grounding his opinion on the authority of Coulson and Coulson, encouraged his grace to complete the purchase, which was in point of value not inconsiderable, and in point of situation very desirable.

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Not only Mr. Booth, but other contemporary and eminent conveyancers, particularly the late Mr. Filmer, had grounded numerous opinions on titles, exceeding in value many hundred thousand pounds, on the authority of Coulson and Coulson, and other legal decisions in favor of an estate tail. It will not now be matter of wonder, that Mr. Booth should be not only alarmed, but much agitated, on his first hearing of the judgement of the court in Perrin and Blake. He desired the honor of a conference with the duke of Richmond, and told his grace, very pathetically, that he had been the innocent cause of his purchasing a considerable estate with a *bad title*, according to a recent judgement, alluding to that in Perrin and Blake. The noble duke received the serious detail of all the circumstances of the case with firmness, and concluded that he supposed the business would not rest under a *single determination*; that he should watch the progress of it, and follow the cause wherever it went. Pleased with this declaration, Mr. Booth acquainted his grace, that, very fortunately, not only for him, but also for his conveyancer, a *son* of the vender, since the purchase was completed, had become of adult age; that this son and heir apparent was, at all *events*, tenant in tail; and that it was incumbent on the father, under the covenant for farther assurance of title, to procure the son to corroborate and confirm the title.

This casual circumstance, though very pleasing, did not abate the diligence, nor prevent the regular attendance of his grace in every court, and at every subsequent argument of the bar and bench on the writ of error; and no person seemed to enjoy more than his grace the honest zeal of lord chief baron Parker, who, when he repeated the emphatical words "*stare decisis*," gave his knuckles a severe rap on the table.

The reader will, it is to be hoped, readily pardon this little digression, a digression which to some may seem trivial, though it is not a little interesting to the author, who was present, and who had the honor of being previously told by the lord chief baron

ron, that as he had the misfortune to differ in opinion with his friend lord Mansfield, the author should see how *cool and guarded* he should be in delivering that opinion in the Exchequer chamber. After that declaration this involuntary and unexpected ebullition of zeal, this firm and *laudable* attachment to *former decisions*, was to him at least peculiarly *striking*. In like manner *Luther*, differing in opinion with the great Erasmus, told Melancthon that he would be very *calm* and *civil* in his reply to *Erasmus*; but, when he set himself about it, he forgot these promises, and his zeal and impetuosity were like two hard-mouthed horses which ran away with the chariot and the charioteer.

Frustra retinacula tendens.

Fertur equis auriga, neque audit curris habenas.

Ep. 704. Jort. Vit. Eras. 344.

A writ of error was brought in the House of Lords upon the judgement of reversal in the Exchequer Chamber; and after it had depended for a considerable time, the parties compromised the dispute, and the plaintiff petitioned for leave to *non-pros* his writ of error, which was granted, as appears from the following entry in the Lords' Journals:

“Upon reading the petition of *Hannah Blake* *, plaintiff, in a writ of error depending in this house, and of *William Perrin* and *Thomas Vaughan*, defendants in the said writ of error, which stands appointed for hearing, setting forth,

“That the matter in dispute between the parties being now amicably compromised between them, the petitioners therefore humbly pray their lordships, that the writ of error in this cause may be *non-prossed*, or withdrawn, without costs on either side. It is ordered that the said petitioners do forthwith enter a *non-pros* on the said writ of error as desired, and the record be

* 7 May, 1777, Blake against Perrin and another.

remitted to the court of *King's Bench*, to the end execution may be had upon the judgement given by that court, as if no such writ of error had been brought into this house."

In this important case, the earl of Mansfield seemed to be conscious that the peculiar circumstances of it could alone form an exception, as it were, to the general rule already laid down.

He found one exception in the case of Backhouse and Wells, to which he has alluded. And admitting that in one single instance he was fallible, in grounding his opinion upon the declaration with which the whole devise was introduced, which seemed to him as strong as the words for *life only* in the case of Backhouse and Wells; permit me to ask, did ever lord Mansfield put in his claim to infallibility? No! His quick discernment, and deep penetration, led him to lament that legal decisions were sometimes founded on erroneous opinions; but, while he lamented the cause, his good sense and great knowledge of the great inconvenience, of overturning settled decisions, these almost invariably kept him in suspense, each attempting to draw him aside. In support of these observations, it would be injurious, and inconclusive, to introduce any words but lord Mansfield's own, founded on twenty years experience, when he delivered them in 1759, and strengthened and confirmed by repeated declarations, too numerous to be named in the course of thirty-two years, wherein he presided as lord chief justice of the court of King's Bench.

In the case of Burges and Wheat, determined in 1750, lord Keeper Henley was pleased to call to his assistance the lord chief justice and the master of the rolls. Lord Mansfield, in delivering his opinion on the origin, nature, and operation of trusts, observed: "The law of trusts, in my apprehension, was not put upon its true foundation till about the time that lord Nottingham had the great seals. By steadily pursuing, from plain principles,

principles, trusts in all their consequences, and by some assistance from the legislature, an ample, rational, and uniform system of law has since been raised. Trusts are made to answer the exigencies of families; to answer all purposes, without being liable to any one fraud, injury, or mischief, which the statute of Henry VIII. meant to avoid. Whether they are agreed in the difference between the trust and the legal estate or not, the trust is considered here as the estate to all intents and purposes; and every consequence follows here which would have attended it at law, except to a purchaser for a valuable consideration."

This just exception of a purchaser for a valuable consideration, led to the discussion of a point, which the softer sex may fairly deem an injurious, if not an unjust determination; which has ever excited wonder, how it could originally creep into the law; *viz.* that the same species of estate, which gives a title to the husband to be tenant, by the curtesy of England, of the real estate of the *wife*, shall exclude her from all title of dower out of the real estate of the *husband*. The author of these sheets again entreats permission to have recourse to lord Mansfield's emphatical words on this interesting occasion:

"It would be endless and very unnecessary to enumerate the various consequences through which this principle, that a trust in chancery is the estate at law, has been pursued by adjudged cases since 25 Charles II. They will occur to every body, and they are very many. It has been, among other things, decreed, that the husband should be tenant by curtesy. The case of dower remains the only exception, in my poor apprehension, not upon the principles of law or reason, but because a long series of determinations and notions had *misled people into many purchases*, and many settlements would be to be set right. Radnor and Vandebendy was determined upon that principle in the House of Lords. The question put to the counsel at the bar was, how conveyancers advised purchasers on the occasion. Sir Joseph Jekyll's argument, in Banks and Sutton, proves clearly that there ought to have been dower of a trust: he stretched it to make a distinction: the

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chancellor said, it would shake all the settlements that had been made *. How it came to be settled at first is a different consideration: perhaps it might be hard to find out a sound reason for it. It is right to follow and adhere to what has been established. When any dissatisfaction has been expressed concerning any of these determinations, it has been generally at denying dower to the wife, and not at allowing an estate for life by the curtesy of the husband; and, if an alteration was to be introduced, the best way, in my apprehension, to set the matter right would be, to allow the wife to have dower of a trust-estate. Though I had a note of it, I cite this from lord Hardwicke's own notes; in that cause, twenty years ago, I imbibed this principle, which every thing, I have heard, read, or thought of since, has confirmed in my mind, that a trust, in the eye of the court, is an estate at law, and governed by the same rules in general, as all real property is by imitation."

"My dear Garrick," said lord Mansfield jocosely to the British Roscius on some similar occasion, "a judge on the bench is now and then in your whimsical situation between Tragedy and Comedy; inclination drawing one way, and a long string of precedents the other."

To conclude these observations with lord Mansfield's own ideas, and to resume the allusion already made to the British Roscius, his lordship considered himself not only *beld*, but even *tied down*, by erroneous opinions in many important instances.

"Arguments of convenience and inconvenience are always (added his lordship in *Burgefs* and *Wheat*) to be taken into consideration, when we are not *tied down* by any erroneous opinions, which have prevailed so far in practice, that property would be shaken by an alteration of them."

Again, in Michaelmas Term, 1764, *Trinder* against *Watson* and another, 3d Burr. 1566. This was a writ of error returnable in parliament brought upon a judgement in this court in an

* Vide *Casburn* and *Inglis*. Cases in King's Bench, 7th, 8th, 9th, and 10th, Geo. II. while lord Hardwicke was chief justice.

action in debt upon a recognizance in error. And the plaintiff in error in parliament *not* having entered into a recognizance, pursuant to 3 J. I. c. 8. the defendant in the writ of error moved for, and obtained, a rule for the said plaintiff in error, to shew cause, why the defendant in error should not be at liberty to *sue out execution*, for *want* of such recognizance.

Lord *Mansfield* observed, "That cases which arose upon remedial laws, he should have thought, ought to have been *liberally* construed. But, in the case of *Bidlefon* and *Whytel*, it appeared, that the determination had been otherwise; and *we must not depart from settled determinations*. In that case the weight of authorities prevailed."

The court ordered it to stand over to enquire into the practice.

We find another striking instance of his great attention to a settled rule, although he lamented the grounds on which it had been previously settled, in 4 Burr. 1960, on the doctrine of Revocation of Wills by subsequent alteration of the estate.

"Where a man (said his lordship) seised of an estate makes his will, and devises it, and afterwards conveys it *entirely* away, though he takes it back by the same instrument, or by a declaration of uses, it is a revocation, because, as it is said in the books, he has *parted with his whole estate*.

"This rule being now established must be adhered to, although it is not founded upon truly rational grounds and principles, nor upon the intent, but upon legal niceties and subtilty. However, as in the earl of *Lincoln's* case it was so far established that it ought to be observed in future if a like case should happen, we must not depart from it now, notwithstanding one would wish that no such rule had ever been established, and lament that such nice subtilties should have been admitted as the ground of it."

Lord *Mansfield*, when fair occasion offered, would sometimes make the bench and the bar relax a little from their accustomed gravity; but the object to be attained by a moment's pleasantry was generally worthy of a great judge: numerous instances of this kind might be adduced by the bar, who have not only enjoyed

joyed the wit, but have also felt the force of the keen arrows which darted occasionally through the court. To select two or three of this nature may relieve the jurisperit a little, who has already travelled over many pages of dry law.

To convert a capital offence to the lighter punishment of transportation, where favorable circumstances, in behalf of a prisoner, made an impression on every one present except the prosecutor.—Here lord Mansfield recommended the jury to find the value of a gold trinket, which the prisoner had stolen, under forty shillings. The prosecutor imprudently and unfeelingly expressed his surprize, “Under forty shillings! my lord? Why the fashion alone cost me more than double the sum.”—“That may be, friend,” replied the chief justice; “yet God forbid that we should hang a man for fashion-sake!”

In his own court, he set too just a value on his time to permit it to be improperly wasted by long interrogatories of counsel in justifying bail, where the debt was barely of magnitude enough to be brought into the Court of King’s Bench. It fell to the lot of the late serjeant Davy to examine a Jew who came to justify bail in a tawdry laced suit of cloaths before lord Mansfield. The jocular and learned serjeant pressed the Israelite close, to know whether he was worth the sum he had sworn to, after all his debts were paid. The Jew answered repeatedly and unequivocally in the affirmative: but, the debt which was the object of the suit being small, and the serjeant still persisting in his interrogatories, his lordship addressed the serjeant unexpectedly with, “For shame, brother Davy, how can you tease the poor gentleman so? Don’t you see, that he would *burn* for double the sum!”

The overseers of a parish having, with more attention to the decrease of parish burthens than to the relief of the distressed, caused Felix Mac Donald to be indicted for converting his house into an hospital, for taking in and delivering lewd, idle, and disorderly

derly unmarried women, who after their delivery went away and deserted their children, *whereby they became chargeable to the parish*.—On a motion to quash the indictment, lord Mansfield took notice, when it was first moved, of the narrow impolitic principles upon which the prosecutors had proceeded, and expressed his surprize how such a bill could ever be found: but, this not being sufficient to prevent the counsel from shewing cause, and from labouring, in behalf of the parish, to get rid of the burthen of the bastard children, his lordship archly asked, by what law it was criminal to deliver a woman when she was with-child? No sufficient answer could be given. The indictment was quashed. 3 Burr. 1646.

In support of the jurisdiction of his court, and to prove the right of interference of the lord chief justice as the *custos morum* of the people (except in some particular cases appropriated to, and peculiarly within, the jurisdiction of the ecclesiastical court), we may fairly adduce the case of the King against sir Francis Blake Delaval and others. *Lord Mansfield*, in delivering the opinion of the court, gives the clearest state of the case, viz.

“ This is a motion for an information against the defendants for a conspiracy, to put a young girl (an apprentice to one of them) into the hands of a gentleman of rank and fortune, for the purpose of prostitution; contrary to decency and morality, and without the knowledge or approbation of her father who prosecutes them for it, who has now cleared himself of all imputation, and appears to be an innocent and an injured man.

“ The fact, uncontroverted, is this: A female infant, then about fifteen, was bound apprentice, by her father, to the defendant Bates, a music-master, the girl appearing to have natural talents for music. The father became bound to the master in the penalty of two hundred pounds for his daughter's performance of the covenants contained in the indenture. She became eminent for vocal music, and thereby gained a great profit to Bates her master. In April, 1763, Bates, her master, indirectly *assigned her to sir Francis*, as much as it was in his power to assign her over; and this is done plainly and manifestly *for bad purposes*. Bates at the same time releases *the penalty to the*
father,

father, but without the father's application, or even privity; *and receives the two hundred pounds from sir Francis* by the hands of his tailor, who is employed to pay it to Bates: then she is *indentured* to sir Francis Delaval, *to learn music of him; and she covenants with him*, both in the usual covenants of indentures of apprenticeship, and likewise in several others (as "not to quit even his apartments"). The girl goes and lives *with sir Francis*, notoriously, *as a kept mistress*. Thus she has been played over by Bates into his hands, for *this* immoral purpose. No man can avoid seeing all this, let him wink ever so much.

"I remember a cause in the court of Chancery, wherein it appeared that a man had *formally assigned his wife over* to another man; and lord Hardwicke directed a *prosecution* for that transaction, as being notoriously and grossly against *public decency and good manners*, and *so* is the present case.

"It is true that many offences of the *incontinent* kind fall properly under the jurisdiction of the *ecclesiastical* court, and are appropriated to it; but, if you except those *appropriated* cases, this court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*: and upon *this* ground both sir Charles Sedley and Curll, who had been guilty of offences against good manners, were prosecuted here."

The legal discussion of the great question respecting Literary Property, and the speeches of lord Mansfield in the case of Millar and Taylor, put in their fair claim to a great degree of attention.

This case was a revival of the old and often-litigated question of Literary Property; and it was the *first determination* which the question ever received in the court of King's Bench.

The jurisperit will receive great benefit and pleasure in attentively perusing the declaration and other proceedings in this very interesting cause, and particularly the speeches* of the puisné judges of the court of King's Bench, who gave their opinions *seriatim*, beginning with the junior judge according to

* 4 Burr. 2303.

usage, and proceeding upward to the lord chief justice. The author of these sheets, however highly he may estimate and revere the very learned and valuable speeches of the other judges, cannot, in a limited publication of this nature, conceive that he will be warranted in offering more to the consideration of the reader than such parts of the case as appear to be necessary, either to give the substance of it, or to elucidate the labors, the indefatigable attention, and the great precision of the judges, who separately discussed this important subject.

The short substance of the case is no more than this. The declaration charges, that the plaintiff Millar was the true and only proprietor of the copy of a book of poems, intituled, "The Seasons, by James Thomson;" and, whilst he was so proprietor of the said copy, caused two thousand books of it to be *printed for sale*, at his own expence; and had a great number of the said two thousand books *remaining in his hands for sale*. That the defendant Taylor *published and exposed to sale* several *other* books of the *like copy*, and bearing the same title; which latter books had been *injuriously printed* by some person or persons without the *licence or consent* of the plaintiff Millar; the defendant *knowing* "that they had been so injuriously printed, without the plaintiff's licence or consent;" by means whereof the plaintiff Millar was deprived of the profit and benefit of the said *copy and book*, and of the *books printed* at his expence as aforesaid, and then remaining in his hands *unsold*; and he lays his damages at two hundred pounds. The defendant Taylor pleads "not guilty:" issue is thereupon joined; and the jury find the special verdict as above.

Mr. Justice Willes, in a speech which fills nearly twenty-five pages in folio in sir James Burrow's Report, gives an analysis of the leading cases on this subject; without a knowledge of which, several parts of lord Mansfield's speeches will not be perfectly

feely understood, in regard that his lordship frequently refers to those cases as correctly stated by his brethren.

“ Few bills against pirates of books are ever brought to a hearing. If the defendant acquiesces under the injunction, it is seldom worth the plaintiff's while to proceed for an account, the sale of the edition being stopped.

“ From the year 1709, to this day, there have not been more than two or three such cases *heard*.

“ The question upon the common law-right, could not arise till twenty-one years from the 10th of April, 1710, for old copies: consequently, the soonest it could arise was after the 10th of April, 1731.

“ On the 9th of June, 1735, in the case of *Eyre versus Walker*, sir Joseph Jekyll granted an injunction to restrain the defendant from printing the *Whole Duty of Man*; the first assignment of which had been made in December, 1657*; and this was acquiesced under.

“ In the case of *Motte versus Falkner*, 28th November, 1735, an injunction was granted for printing Pope's and Swift's *Miscellanies*. Many of these pieces† were published 1701, 1702, 1708; and the counsel strongly pressed the objection as to these pieces. Lord Talbot continued the injunction as to the whole; and it was acquiesced under. Yet Falkner, the Irish bookfeller, was a man of substance; and the general point was of consequence to him: but he was not advised to litigate farther.

“ On the 27th of January, 1736, in the case of *Walthoe versus Walker*, an injunction was granted by sir Joseph Jekyll, for printing Nelson's *Festivals and Fasts*; though the bill sets forth, that it was printed in the lifetime of Robert Nelson the author‡; and that he died in January, 1714§. This too was acquiesced under.

* Dr. Hammond's Letter to the Bookfellers.

† 1701, *Contests and Dissentions between Athens and Rome*. 1707, *Productions for 1708*. 1708, *Partridge's death*. 1708, *Sentiments of a Church-of-England-Man*. *Vanbrugh's House*. *Baucis and Philemon*. 1709, *Project for Advancement of Religion, and Reformation of Manners*.

‡ It was printed in 1703.

§ Prout Preface.

“ On the 5th of May, 1739, in the case of Tonson, *et alios, versus* Walker otherwise Stanton, before lord Hardwicke, an injunction was granted, to restrain the defendants from printing Milton's Paradise Lost. The plaintiffs derived their title under an assignment of the copy from the author in 1667, which was read. This injunction was also acquiesced under.

“ In the case of Tonson *versus* Walker and Merchant, before lord Hardwicke, the bill was filed 26th November, 1751, suggesting that the defendants had advertised to print “ Milton's Paradise Lost, with his Life by Fenton; and the Notes of all the former Editions,” of which Dr. Newton's was the last. The bill suggests a pretence “ that the defendant had a right.” It derives a title to the poem, from the author's assignment in 1667. That it was published about 1668; and it derives a title to his life by Fenton, published in 1727, and to Bentley's Notes published in 1732, and Dr. Newton's in 1749. The answer came in the 12th of December, 1751: wherein the defendants insisted they had a right to print their work in numbers, and to take in subscriptions: and they put in their answer so expeditiously as to prevent an injunction before answer.

“ It was intended to take the opinion of the court solemnly. The searches and affidavits, which were thought necessary to be made, occasioned a delay; and no motion was made till near the end of April, 1752.

“ The injunction was moved for on Thursday the 23d of April. Lord Mansfield argued it. It was argued at large, upon the general ground of *copy-rights at common law*.

Lord Chancellor directed it to proceed on the Saturday following; and to be spoken to by one of a side. Afterwards it stood over, by order, till Thursday the 30th of April, when it was argued very diffusively.

“ The case could not possibly be varied at the hearing of the cause; the notes of the last edition (Dr. Newton's) were *within* the act; but an injunction as to *them only* would have been of little avail; and it did not follow that the defendants should not be permitted to print what they had a *right* to print, because they had attempted to print *more*. For, in the cases of Pope *versus* Curll, 5th of June, 1741, lord Hardwicke enjoined the defendant only from printing and selling the *plaintiff's* letters: there were a great many *more* in the book which the defendant had printed, which the *plaintiff* had no right to complain of.

“ If the inclination of lord Hardwicke's own opinion had not been strongly with the plaintiff, he never would have granted an injunction to the
whole,

whole, and penned it in the *disjunctive*; so that printing the poem, or the life, or Bentley's notes, without a word of Dr. Newton's, would have been a breach.

“ The injunction is not barely to the selling of *that* book, of which Newton's notes made a part, but to *future printing*.

“ He might have sent it to law then, as well as at the hearing: but he probably foresaw he should never hear of it again. Accordingly, the parties understood his way of thinking; and the defendants acquiesced under the injunction, and so have made it perpetual; and would now be guilty of a breach if they printed Milton.

“ I do admit that (except from the order he made, which he saw and penned,) he guarded against being thought finally to determine the question.

“ He cited the Stationers Company *versus* Partridge as an authority for an injunction where the right was *doubtful*. He observed upon Dr. Newton's notes, either transcribed or colourably abridged, being within the act: and, according to a note I have of the case, he said ‘ the strongest authority is what the judges have said in the case of Seymour (1 Mod.) and in the argument of prerogative copies. Distinctions are taken upon the ground of the king's property in *Bibles, Latin Grammars, Common Prayer, and Year-Books*; that they were made and published at the *expence* of the crown, *ergo* the *king's property*. These arguments being allowed to support that right, *infer* such a *property existing*.’

“ That very point was then depending in this court, upon a case sent by himself, in Baskett *versus* the University of Cambridge.

“ It would not have been agreeable to lord Hardwicke's great decency and prudence to have spoken out *decisively* upon a general *legal* right *never decided at law*, and to have grounded his opinion upon an argument which was then a question *sub judice*.

“ The question upon Literary Property was brought before this court in the case of Tonson *versus* Collins; and, after two arguments, was adjourned into the Exchequer-chamber. I have been informed, from the best authority, that, so far as the court had formed an opinion, they all inclined to the plaintiff: but as they suspected that the action was brought by collusion; and a nominal defendant set up, in order to obtain a judgement which might be a precedent against third persons; and that therefore a judgement,

in favor of the plaintiff, would certainly have been acquiesced in ; upon *this* suspicion, and because the court inclined to the plaintiff, it was ordered to be heard before *all* the judges.

“ Afterwards, upon certain information received by the judges, “ that the whole was a collusion ; that the defendant was *nominal only* ; and the *whole expence* paid by the plaintiff :” they refused to proceed in the cause ; though it had been argued *bonâ fide*, and very ably by the counsel, who appeared for the defendant. They thought this contrivance to get a collusive judgment was an attempt of a dangerous example, and therefore to be discouraged.

“ The pendency of this cause was publicly known : but the reason of its discontinuance was not.”

Mr. Justice Willes having, with great precision, industry, and ability, gone over a large field of solid argument and elucidation of the case, concluded with observing what he had avoided to discuss or enlarge upon to the following effect :

“ I have avoided a large field which exercised the ingenuity of the bar. Metaphysical reasoning is too subtle ; and arguments from the supposed modes of acquiring the property of acorns, or a vacant piece of ground in an imaginary state of nature, are too remote. Besides the comparison does not hold between things which have a physical existence and incorporeal rights.

“ It is certainly not agreeable to natural justice, that a *stranger* should reap the *beneficial pecuniary produce* of another man’s work. *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores.*

“ It is wise in any state to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it is, by securing to them the property of their own works. Nobody contributes, who is not willing ; and, though a good work may be run down, and a bad one cried up, for a time, yet, sooner or later, the reward will be in proportion to the merit of the work.

“ A writer’s fame will not be the less, that he has bread, without being under the necessity of prostituting his pen to flattery or party to get it.

“ He

“He who engages in a laborious work, (such for instance as Johnson’s Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family.

“I never heard any inconvenience objected to Literary Property, but that of *enhancing the price* of books. *This* judgement will *not* be a precedent in favour of a proprietor who is *found* by a jury to have enhanced the price. An owner may find it worth while to give more correct and beautiful editions, which is an advantage to Literature: but his *interest* will prevent the price from being unreasonable. A *small* profit, in a *speedy* and *numerous* sale, is much larger gain than a *great* profit upon each book in a *slow* sale of a *less* number. Upon these reasons, I am of opinion, that there is a *common law right* of an author to his copy; that it is not taken away by the act of the 8th of queen *Anne*; and that judgement ought to be for the *plaintiff*.”

Mr. Justice Aston next delivered his sentiments, and began with observing, that “this case has been so often, so fully, and so ably argued; the citations from history, decrees, ordinances, statutes, and precedents in Westminster-hall, have been stated so accurately in point of time and substance; and the whole arguments have been gone into so largely by my brother Willes; that I shall content myself with alluding to them, as *now* fully and precisely known, without stating any of them over again (at large), which I shall have occasion to take notice of.

The great questions which he propounded, and very fully and ably discussed, were these:

“I. Whether an *author’s property* in his own literary composition is such as will intitle him, at *common law*, to the *sole right* of multiplying the copies of it:” or,

“II. Supposing he *has* a property in the original composition: “Whether the *copy-right*, by his *own publication* of the work, is necessarily *given away*, and *his consent* to such gift *implied by operation of law*, manifestly *against his will*, and *contrary to the finding of the jury*;” or,

“III. Taken away from him, or restrained by the *statute of queen Anne*.”

“It has been ingeniously, metaphysically, and subtilly, argued on the part of the defendant, “that there is a *want of property* in the *thing itself*, wherein

wherein the plaintiff supposes himself to be injured; and consequently, if there is *no property* or *right*, there is no *injury* or *privation of right*."

"The plaintiff's supposed property has been treated as quite *ideal* and *imaginary*; not reducible to the comprehension of men's understanding; not an *object* of law, nor *capable* of protection.

"As to *all the objections* to this property or right being *allowed or protected by the common law*, rest entirely upon arguments which endeavour to shew, "that such allowance or protection is *contrary to right reason, and natural principles*," the only grounds of common law *originally* applicable to this question:—I think fit (however abstract they may seem) to consider certain great truths and sound propositions, which we, as rational beings, we, to whom reason is the great law of our nature, are laid under the obligation of being *governed by*; and which are most ably illustrated by the learned author of the Religion of Nature delineated, that is to say:

"That *moral good and evil* are *coincident* with *right and wrong*;" for, that cannot be good which is wrong; nor that evil which is right*. "That *right reason is the great law of nature*, by which our acts are to be adjudged; and according to their conformity to this, or deflection from it, are to be called *lawful* or *unlawful*, good or bad†." "That *whatever* will bear to be *tried* by that reason is *right*; and that which is *condemned* by it is wrong‡." "That to act according to *right reason*, and to act according to *truth*, are in effect the *same thing* §."

"Then (speaking of truths respecting mankind in general, antecedent to all human law ||) "That man being capable of distinct properties in things which he only, of all mankind, can call his," he says,

"The *labour* of B cannot be the *labour* of C, because it is the application of the organs and powers of B, not of C, to the effecting of something; and therefore the *labour* is as much B's as the *limbs* and *faculties* made use of are *his*."

"Again, the *effect* or *produce* of the labour of B is not the *effect* of the labour of C; and therefore this *effect* or *produce* is B's, not C's. It is as much B's, as the *labour* was his, not C's; because, what the labour of B causes, or

* Page 21. § 1.

† Page 23. § 5. Page 126.

‡ Page 23.

§ Ibid.

|| Page 127. § 6.

produces,

produces, B produces *by his* labour; or it is the product of *his* labour; therefore it is *his*, not C's, or any others. And if C should *pretend* to any *property* in that, which B *only* can truly call *his*, he would act *contrary to truth* *.

“That to deprive a man of the fruit of his own *cares* and *sweat*; and to enter upon it, (he is here speaking of the cultivation of *lands*,) as if it was the effect of the *intruder's* pains and travel, is a most manifest *violation of truth*: it is *asserting, in fact, that to be his* which cannot be *his* †.

“There is then such a kind of *property founded in nature and truth*; or, there are things which *one man only* can, consistently with nature and truth, call *his* ‡; as proposition 2. 8. 9. demonstrate.

“And those things, which *only one man* can truly and properly call *his*, must remain *his*, till he agrees to part with them by *compact* or *donation*; because no man can deprive him of them without his approbation; but the *depriver* must use them *as his*, when they are *not his*, in contradiction to truth. For, “to have the *property*” of any thing, and “to have the *sole right* of using and disposing of it,” are the *same* thing; they are equipollent expressions §.

Property, *without the use*, is an *empty sound*. He who *uses or disposes* of any thing, does by *that* declare it to be *his*; because this is *all* that he, whose it *really* is, can do. *Borrowing* and *hiring* afford no objection to this: for he uses what is *his own* for the time allowed; and his doing so is only *in one of these ways, in which the true proprietary disposes of it* ||.

From this *great theory of property* many definitions arose, much practice was elucidated, and many just conclusions were drawn, which cannot with propriety be introduced here. The conclusion however of Mr. Justice Aston's speech is too animated to be passed over in silence. After an enumeration and judicious examen of all the cases on the subject, he proceeded:

“These cases prove “that the court of Chancery granted injunctions to protect the right, on supposition of its being a *legal* one.”

* Pages 127, 128.

† Prop. 8. § 6. page 134.

‡ Prop. 10. § 6. page 136.

§ Page 136.

|| Page 137.

“ And no injunction was ever *refused in Chancery*, upon the *common-law* right, till a doubt was *supposed* to have arisen in *this* court, from the case of *Tonson versus Collins* (which was then depending) having been twice argued, and then adjourned to be argued before all the judges : the reason of which has often been declared to be, *not* from any *doubts* or *difference of opinion*, but merely from a supposition of *collusion* ; and which collusion was afterwards the cause why it was neither argued nor determined.

“ *Upon the whole*, I conclude, that, upon every principle of *reason, natural justice, morality, and common-law* ; upon the evidence of the *long-received opinion* of this property, appearing in antient proceedings, and in law-cases ; upon the clear sense of the *legislature* ; and the opinions of the *greatest lawyers* of their time, in the court of *Chancery*, since that statute ; the right of *an author to the copy of his works* appears to be *well founded* ; and that the *plaintiff* therefore is, upon this special verdict, *intitled to his judgement* ; and I hope the learned and industrious will be permitted, from henceforth, not only to reap the *fame*, but the profits, of their ingenious labours, without interruption, to the honour and advantage of themselves and their families.

Mr. Justice Yates was of a different opinion from the two judges who had spoken before him, he said,

“ He should ever be extremely diffident of any judgement of his own, when he had the misfortune to dissent from either of his brethren. And, after the very learned and ingenious arguments which each of them had now delivered, he could not but feel, with particular sensibility, the unequal task he had now before him.

“ He regretted too, that, in so liberal a question, so important to the literary world, and a question of so much expectation, there should be any disagreement upon this bench. But he observed, that, if he should happen to stand quite *alone* in the opinion he had formed, his sentiments would no way affect the *authority* of the decision.

“ Whatever his opinion, however, might be ; fitting in his *judicial* capacity, he thought himself bound, both in *this* and in *every* cause, to *declare it frankly and firmly*.

“ After

“After this very decent preface, he spoke near three hours, in support of his opinion, with great ability, learning, and precision. The answer given by him, to an ingenious observation of Mr. justice Blackstone, is presented to the reader as one of the many accurate discriminations made in the course of the argument.

“There is one ground more upon which the plaintiff’s counsel centended this claim of right; and which, at first sight, appears the most specious of all. They endeavoured to enforce this copy-right of authors as a *moral* and *equitable* right; and to support it by arguments calculated to prove that it is so.

“For this purpose Mr. Blackstone observed, that the labours of the *mind*, and productions of the *brain*, are as justly intitled to the benefit and emoluments that may arise from them as the labours of the *body* are; and that literary compositions, being the produce of the *author’s own labour and abilities*, he has a *moral* and *equitable right* to the profits they produce; and is fairly intitled to these profits *for ever*; and that, if others usurp or encroach upon these moral rights, they are evidently guilty of injustice, in pirating the profits of another’s labour, and reaping where they have not sown.

“This argument has indeed a captivating sound; it strikes the passions with a winning address: but it will be found as fallacious as the rest, and equally begs the very question in dispute. For, the *injustice* it suggests depends upon the *extent* and *duration* of the *author’s property*; as it is the *violation* of that property that must alone *constitute* the injury. If therefore his property be *determined*, no injury is done him. The question, therefore, is whether *all the property* of the author did not *cease*, and the work become *open*, by his own act of publication.” In that case, the defendant cannot be charged with *any injustice*; but has merely exercised a *legal* right. And, however we may lean to literary merit, the property of *authors* must be subject to the *same rule of law* as the property of *other* men is governed by. It is, therefore, as capable of being *laid open as any other* invention of any other man: and if, by *publication*, it becomes *common*, (as I shall observe by and by,) can the author *complain* of the loss? Can he complain of losing the bird he has himself voluntarily turned out?

“But it is insisted, “That it conscientiously belongs to the author himself and his assigns *for ever*, as being the fruits of his own labour.”

“That every man is intitled to the “*fruits of his own labour*” I readily admit. But he can only be entitled to this, *according to* the fixed constitution of things; and *subject* to the general rights of mankind, and the general rules of property. He must not expect that these fruits shall be *eternal*; that he is to monopolize them to infinity; that every vegetation and increase shall be confined to *himself alone*, and *never* revert to the *common mass*. In *that* case, the injustice would lie on the side of the *monopolist*, who would thus *exclude all the rest* of mankind from enjoying their *natural and social rights*.

The labours of an author have certainly a right to a *reward*: but it does not from thence follow, that this reward is to be *infinite* and *never to have an end*. Here, it is *ascertained*. The *legislature* have *fixed the extent* of his property, they have allowed him twenty-eight years; and have expressly declared he shall have it *no longer*. Have the legislature been guilty of injustice? Little cause has an author to complain of injustice after he has enjoyed a monopoly for twenty-eight years, and the manuscript still remains his own property. It has happened in the present case, that the author and his assignee together have enjoyed the emolument of this work between thirty and forty years: and the plaintiff still has the manuscript.

“If a stranger had taken his manuscript from him, or had surreptitiously obtained a copy of his work, and printed it before him, he might then complain of injustice. And here lies the *fallacy* of this specious argument: It was put as if the author was *totally robbed* of the profit of his labour; as if *all* his emolument was forestalled, without suffering him to reap *any* emolument *whatever*. In *that* case, it would be the *highest injustice*. But, when *no such* intrusion has been made upon his property; when he and his assigns have enjoyed the *whole produce* of his labour for twenty-eight years together and upwards; what ground can remain for accusing the defendant of *immorality*? or for the author or his assigns to say, “he is *robbed* of the fruits of his *labour*?”

“If an author is permitted to enjoy his property according to the *nature* of it, he can have *no injustice* done him: and *if* his situation is such, that he can only dispose of it as other people can of their goods; or if he can only dispose of it for the *first publication*; can the author *murmur*, because he can dispose of it *only as other people* can of *their* property? Shall an *author's* claim

claim continue, *without bounds of limitation*; and *for ever restrain all the rest* of mankind from their *natural rights*, by an *endless monopoly*? yet *such* is the claim that is now made; a claim to an *exclusive* right of publication, *for ever*. It is not easy to determine whether the conciseness of the proof, or the neatness in which it was dressed, is to be preferred, that the right claimed by an author, is not a common-law right.

“On what ground then can an *author* claim this right? How comes *his* right to be superior to that of the ingenious inventor of a new and useful mechanical instrument? Especially when we consider this island as the seat of commerce, and not much addicted to literature in antient days; and therefore can hardly suppose that our laws give a higher right or more permanent property to the author of a book than to the inventor of a new and useful machine.

“Improvement in learning was no part of the thoughts or attention of our ancestors. The invention of an author is a species of property *unknown* to the common law of *England*. Its usages are *immemorial*; and the views of it tend to the benefit and advantage of the public with respect to the necessities of life, and not to the improvement and graces of the mind. The latter, therefore, could be no part of the antient common-law of *England*.

“When the genius of the nation took a more liberal turn, and learning had gained an establishment among us, it was then the office of the *legislature* to make such provisions for its encouragement as to them should seem proper. And accordingly they *have* done so, by the statute of queen Anne*, which lord Hardwicke is said to have styled (in the case of *Midwinter et al. versus The Scotch Bookfellers*) “an *universal patent* for authors.”

“I wish as sincerely as any man, that learned men may have all the encouragements and all the advantages that are consistent with the general right and good of mankind. But, *if* the monopoly now claimed be *contrary* to the *great laws of property*, and totally *unknown to the antient and common-law of England*; *if* the establishing of this claim will directly *contradict the legislative authority*, and introduce a *species* of property contrary to the end for which the whole system of property was established; *if it* will tend to *embroil the peace* of society with frequent contentions; (contentions most highly dis-

* 8 Anne, c. 19.

figuring the face of literature, and highly disgusting to a liberal mind), *if it will hinder or suppress the advancement of learning and knowledge; and, lastly, if it should strip the subject of his natural right; if these, or any of these mischiefs would follow, I can never concur in establishing such a claim.*

“The legislature have provided the proper encouragements for authors, and at the same time have guarded against all these mischiefs. To give that legislative encouragement a *liberal construction* is my *duty* as a judge, and will ever be my *own* most willing *inclination*; but it is equally my duty, not only as a judge, but as a *member of society*, and even as a *friend to the cause of learning*, to *support the limitations of the statute.*

“I shall therefore conclude, in the words of the act of parliament, ‘that the author or purchaser of the copy shall have the sole right for the *particular term* which the statute has granted and limited, but not longer;’ and, consequently, that the plaintiff, who claims a *perpetual and unbounded monopoly*, has no legal right to *recover.*

Lord Mansfield, not intending to go into the argument, said,

“This is the first instance of a *final* difference of opinion in this court since I sat here. Every order, rule, judgement, and opinion, has *hitherto* been *unanimous.*

“That unanimity never could have happened if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgements without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other’s reasons.

“We have all equally endeavoured at that unanimity upon this occasion; we have talked the matter over several times; I have communicated my thoughts at large in *writing*; and I have *read* the three arguments which have been now delivered; in short, we have *equally tried* to convince *or* be convinced; but in vain. We *continue to differ*; and, whoever is right, *each* is bound to abide by, and deliver, *that* opinion which he had formed upon the fullest examination.

“His lordship observed, that *to repeat* the two first arguments, or go over the same topics again, would be idle and nugatory, when he had already declared, “that he read, approved, and previously concurred in them;” and to be particular in opposing and answering the several parts of the last argu-
ment,

ment, though he differed from the conclusions of it, would be indecent, and look too much like altercation.

“ He therefore only desired to refer to the two first arguments without actually repeating them, and that he might be understood as if he had spoken the substance of them, and fully adopted them; after which he expressed himself to the following effect :

“ From premisses either expressly admitted, or which cannot be, and therefore never have been, denied, conclusions follow, in my apprehension, *decisive* upon all the objections raised to the *property* of an author in the *copy of his own work* by the *common law*.

“ I use the word ‘ Copy’ in the *technical* sense in which that name or term has been used, for ages, to signify an *incorporeal right* to the *sole* printing and publishing of somewhat intellectual, communicated by letters.

“ First admission. It has all along been expressly admitted, ‘ that, by the *common law*, an author is entitled to the copy of his own work *until* it has been once printed and published by his authority;’ and ‘ that the four cases in Chancery cited for that purpose are *agreeable to the common law*; and the relief was *properly* given in consequence of the legal right.’

“ The property in the copy *thus abridged* is *equally* an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is *equally* detached from the manuscript, or any other *physical* existence whatsoever.

“ The property thus abridged is equally capable of being violated by a crime *indictable*. In like manner, it can only be violated by another’s printing without the author’s consent; which is a *civil* injury.

“ The only remedy is the same, by an action upon the case for damages or a bill in equity for a specific relief.

“ No action of *detinue*, *trover*, or *trespass*, *quare vi et armis*, can lie, because the *copy thus abridged* is *equally* a property in *notion*, and has *no corporeal tangible* substance.

“ No *disposition*, no *transfer* of *paper* upon which the composition is written, marked, or impressed, though it gives the *power* to print and publish, can be construed a *conveyance of the copy*, without the author’s express consent ‘ *to print and publish*,’ much less *against* his will.

“ The property of the copy *thus narrowed* may *equally* go down from generation to generation, and possibly continue for ever, though neither the
author

author nor his representatives should have any manuscript whatsoever of the work, original, duplicate, or transcript.

“ Mr. Gwynn was entitled, undoubtedly, to the *paper* of the transcript of lord Clarendon’s History; which gave him the *power* to print and publish it after the fire at Peterham, which destroyed one original. This *might* have been the *only* manuscript of it in being. Mr. Gwynn might have thrown it into the fire if he pleased; but, at the distance of near a hundred years, the *copy* was adjudged the property of lord Clarendon’s representatives; and Mr. Gwynn’s printing and publishing it, *without their consent*, was adjudged an *injury to that property*, for which, in different shapes, he paid very dear.

“ Dean Swift was certainly proprietor of the *paper* upon which Pope’s letters to him were written. I know Mr. Pope had *no* paper upon which they were written, and a very imperfect memory of their contents, which made him the more anxious to stop their publication, knowing that the printer had got them.

“ If the copy belongs to an author *after* publication it certainly belonged to him before; but if it does not belong to him after, where is the common law to be found, which says, ‘there is such a property before?’ All the metaphysical subtilties, from the nature of the thing, may be *equally* objected to the property before. It is *incorporeal*; it relates to ideas detached from any *physical* existence. There are *no indicia*: another may have had the same thoughts upon the same subject, and expressed them in the same language *verbatim*.

“ At what time, and by what act does the property commence? The same string of questions may be asked upon the copy before publication. Is it *real* or *personal*? Does it go to the *heir* or to the *executor*? Being a right which can only be defended by action, is it, as a *chose* in action, *assignable* or not? Can it be *forfeited*? Can it be taken in *execution*? Can it be *vested in the assignees* under a commission of bankruptcy?

“ The common law, as to the copy before publication, cannot be found in custom. Before 1732, the case of a piracy *before* publication never existed; it never was put nor supposed. There is not a syllable about it to be met with any where. The regulations, the ordinances, the acts of parliament, the cases in Westminster Hall, all relate to the copy of books *after* publication by the authors.

“ Since

“ Since 1732, there is not a word to be traced about it, except from the four cases in Chancery.

“ Besides, if all England had allowed this property two or three hundred years, the same objection would hold, ‘ that the usage is *not immemorial*;’ for, printing was introduced in the reign of Edw. IV. or Hen. VI.

“ *From what source* then is the *common law* drawn, which is admitted to be so clear in respect of the copy *before* publication?

“ From *this* argument, because it is just that an author reap the pecuniary profits of his own ingenuity and labour. It is *just* that another should not use his name without his consent. It is *fit* that he should judge when to publish, or whether he ever will publish. It is *fit* he should not only choose the time but the manner of publication; how many; what volume; what print. It is *fit* he should choose to whose care he will trust the accuracy and correctness of the impression, in whose honesty he will confide not to foist in additions, with other reasonings of the same effect.

“ I allow them *sufficient* to shew ‘ it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy *before* publication.’

“ But the *same* reasons hold *after* the author has published; he can reap no pecuniary profit, if the next moment after his work comes out it may be pirated upon worse paper, and in worse print, and in a cheaper volume.

“ The 8th of queen Anne is no answer; we are considering the *common law* upon principles *before* and *independent* of that act.

“ The author may not only be deprived of any *profit*, but *lose* the expence he has been at. He is no more master of the use of his own *name*. He has no controul over the *correctness* of his own work. He cannot *prevent additions*. He cannot *retract errors*. He cannot *amend* or *cancel* a faulty edition. Any one may print, pirate, and perpetuate the *imperfections*, to the disgrace and against the will of the author; may propagate sentiments under his name, which he *disapproves*, *repents*, and is *ashamed of*. He can exercise no discretion as to the *manner* in which, or the *persons* by whom, his work shall be published.

“ For these and many more reasons, it seems to me just and fit ‘ to protect the copy *after* publication.’

“ All objections, which hold as much to the kind of property *before* as to the kind of property *after* publication, go for nothing; they prove too much.

“ There

“ There is *no peculiar* objection to the property *after*, except ‘ that the copy is *necessarily made common* after the book is once published.’

“ Does a transfer of paper upon which it is *printed* necessarily transfer the copy more than the transfer of paper upon which the book is *written*?

“ The argument turns in a circle ; ‘ the copy is made common, because the law does not protect it ; and the law cannot protect it, because it is made common.’

“ The author does not mean to make it common ; and if the law says ‘ He ought to have the copy after publication,’ it is a several property, easily protected, ascertained, and secured.

“ The whole then must finally resolve in this question, ‘ Whether it is agreeable to *natural principles*, moral *justice* and *fitness*, to allow him the copy *after* publication as well as *before*.’

“ The *general consent* of this kingdom, for ages, is on the *affirmative* side. The *legislative* authority has *taken it for granted* ; and interposed *penalties* to *protect it for a time*.

“ The single opinion of such a man as Milton, speaking, after much consideration, upon the very point is stronger than any inferences from gathering acorns and seizing a vacant piece of ground ; when the writers, so far from thinking of the very point, speak of an imaginary state of nature before the invention of letters.

“ The *judicial opinions* of those eminent lawyers and great men who *granted* or *continued* injunctions in cases *after* publication, *not within* the 8th of queen Anne, uncontradicted by any book, judgement, or saying, must weigh in *any* question of law, much more in a question of mere theory and speculation as to what is agreeable or repugnant to *natural principles*. I look upon *these* injunctions as *equal* to any final decree.

“ Whoever has attended the court of Chancery knows, that if an injunction, in the *nature* of an injunction, to *stay waste*, is *granted upon motion* or *continued after answer*, it is in vain to go to *hearing* ; for, such an injunction *never* is granted upon motion *unless* the *legal property* of the plaintiff is *made out*, nor continued after answer *unless* it still remains *clear*, allowing all the defendant has said. In *such* a case the defendant is always advised either to *acquiesce* or *appeal* ; for he never can make a better *defence* than is stated upon his own answer.

“ This

“ This case is not sent hither from the Court of Chancery upon any doubt of theirs. There never was a doubt in the Court of Chancery, till a doubt was raised there from decency, upon a *supposed* doubt in *this* court, in the case of Tonson and Collins. There is not an instance of an injunction refused, till it was refused upon the grounds of that doubt. The Court of Chancery *never* grant injunctions in cases of this kind, where there is any *doubt*. Therefore they refused it when they thought there was a doubt. That case was argued twice with solemnity; and after the second argument it was referred to the Exchequer Chamber, to be argued before all the judges.

“ That reference did not arise from any difference of opinion or difficulty among us. On the contrary, we suspected collusion; and that if we gave judgement for the plaintiff, there certainly would be *no* writ of error. We wished to take the opinion of *all* the judges. We were afterwards clearly informed of the truth of the collusion; and therefore the cause proceeded no farther.

“ But while it hung under this *appearance* of difficulty, there was sufficient ground for the Court of Chancery to say, “ the property was *doubtful*.” They did not send it to law; they left the party to follow his *legal* remedy. A *doubtful* legal title must be tried at law, before it can be made the ground of an injunction. Injunctions of *this* kind are rightly and properly refused. In a *doubtful* case it would be *iniquity* to grant them, because, if it should come out, ‘ that the plaintiff has *no* legal title,’ the defendant is injured by the injunction, and can have no reparation.

“ If it is agreeable to natural principles to allow the copy *after* publication, I am warranted by the admission which allows it *before* publication, to say, ‘ that this is *common law*.’

“ There is another *admission* equally conclusive.

“ Second admission. It is, and has all along been admitted, ‘ that, by the *common law*, the king’s copy continues *after* publication, and that the unanimous judgement of this court in the case of Baskett and the *University of Cambridge* * is right.’

* Michaelmas, 1758, 32 G. II. vid. 4 Burr. p. 661.

“The king has no property in the art of printing. The ridiculous conceit of Atkins was exploded at the time.

“The king has no authority to restrain the press, on account of the subject-matter upon which the author writes, or his manner of treating it.

“The king cannot by law grant an exclusive privilege to print any book which does not belong to himself.

“*Crown copies* are, as in the case of an author, civil property; which is deduced, as in the case of an author, from the KING's right of original publication. The *kind* of property in the crown, or a patentee from the crown, is just the *same*; incorporeal, incapable of violation but by a civil injury, and only to be vindicated by the same remedy, an action upon the case, or a bill in equity.

“There were no questions in Westminster Hall *before the Restoration* as to *Crown copies*. The *reason* is very obvious: it will occur to every one that hears me. The *fact* is, however, is so: there were none before the Restoration.

“Upon every patent which has been litigated *since*, the counsel for the patentee, whatever else might be thrown out, or whatever encouragement they might have, between the Restoration and Revolution, to throw out notions of power and prerogative, have tortured their invention to stand upon property.

“Upon Rolle's Abridgement they argued from the *Year-books*, which are there abridged, ‘that the Year-books having been compiled at the king's *expence*, were the king's *property*, and therefore the printing of them belonged to his patentee.’

“Upon Croke's Reports they contended, ‘that the king *paid the judges* who made the decisions; *ergo* the decisions were *his*.’ The judges of Westminster Hall thought they belonged to the *author*, that is, to the purchaser from, or the executor of, the author; but so far the controversy turned upon property.

“In Seymour's case, 1 Mod. 256, who printed Gadbury's Almanac without leave of the Stationer's Company, who had a patent for the sole printing of Almanacs, Pemberton resorted to *property*. He argued, besides arguing from the prerogative, ‘that an almanac has *no certain author*; therefore the king has the *property*, and, by consequence, may grant his property.’ It was far-fetched; and it is truly said, ‘that the consequence did *not* follow.’ For,
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if there was no certain author, the property would *not* be the king's, but *common*. Pemberton was a very able lawyer, and saw the necessity of getting at *property*, if he could make it out.

“All the decrees in Chancery and the judgements at common law upon *almanacs* are now out of the case, and all the doctrine of prerogative rejected, by what was done in the case of *The Stationers Company and Partridge*.

“It came on, in the year 1709, before Lord Cowper on continuing the injunction. There is no report of it, I believe, in print; at least I have not seen any. I have read the bill and answer. The bill puts it upon all the prerogative notions of power, and insists, that the king's patentee had a sole exclusive right of printing almanacs. The answer insists, that these were extravagant illegal notions; that they were taken up at times when the prerogative ran high, and when the dispensing power was allowed; and it insists, that the question ought, since the Revolution, to be argued upon proper principles, consistent with the rights and privileges of the subject. The defendants denied the authority of all the cases stated by the bill, as far as they went upon *prerogative* right. Lord Cowper continued the injunction till hearing. I have office-copies of all the orders and pleas that were cited: I dare say I have thirty or forty of them. It appears, that these decrees were all read; and that the judgement of the House of Lords was read and gone through. Lord Harcourt afterwards heard the cause. He did not choose in a case about almanacs to decide upon prerogative. He therefore made a case of it for the opinion of this court, lord Parker being then chief justice. This court, so far as it went, inclined against the right of the crown in almanacs; but, to this hour, it has never been determined; and the injunction granted by lord Cowper still continues.

“I have Salkeld's manuscript report, and have had it many years, of what passed in this court in the course of the argument of this case of *The Company of Stationers* against *Partridge*. I do not know whether it is got into print: I have not seen it in print. Mr. York had a copy of it when he argued the case of the *University of Cambridge* and *Baskett*. Mr. Salkeld argued for the defendant *Partridge*; Sir Peter King for the plaintiffs.

“I will state to you, so far as is material to the argument, how they put it, and the only grounds that they thought tenable.

“Mr. Salkeld, after positively and expressly denying any prerogative in the crown over the press, or any power to grant any exclusive privilege,

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says,

says, 'I take the rule in all these cases to be, that where the crown has a *property* or *right of copy* the king may grant it. The crown may grant the sole printing of *Bibles in the English translation*, because it was made at the *king's charge*. The same reason holds as to the *Statutes*, *Year-books*, and *Common Prayer Books*.

"Sir Peter King, for the plaintiffs, argues thus, throwing out, at the same time, the things that I have already mentioned, though he don't seem to be very serious in it: 'I argue, that *if* the crown has a right to the Common Prayer Book, it has a right to *every part* of it; and the calendar is a part of the Common Prayer Book, and an almanac is the same thing with the calendar, &c.'

"Parker, chief justice, speaks to nothing said at the bar, but only, 'whether the calendar is part of the Common Prayer Book.' And as to that, he goes back as far as the Council of *Nice*, and doubts whether it is, or rather indeed thinks that it is not, part of it; he says, it may be an *Index*, but is *no part* of it.

"Mr. Justice Powell says, 'You must distinguish this from the common cases of monopolies, by shewing some *property* in the crown, and bringing it within the case of the Common Prayer Book;' and he rather inclined to think, 'that almanacs might be the king's,' because there is a trial by *almanacs*.

"To which lord Parker replied, 'that he never heard of such a thing as a *trial by almanac*.'

"They leave it upon this. It stood over for another argument, to see if they could make it like the case of the Common Prayer Book. I don't know what happened afterwards; but there never was any judgement, and, though I have made strict enquiry, I don't find that there was ever any opinion given.

"I heard lord Hardwicke say what Mr. Justice Willes has quoted as to these arguments from property in support of the king's right necessarily inferring an author's.

"The case of Baskett and the University of Cambridge was *then depending* in this court, when lord Hardwicke made use of that expression or argument. It has since been determined. We had no idea of any prerogative in the crown over the press, or of any power to restrain it by *exclusive* privileges, or
of

of any power to control the subject-matter on which a man might write, or the manner in which he might treat it. We rested upon *property* from the king's *right of original publication*.

“Acts of parliament are the works of the *legislature*; and the publication of them has always belonged to the king, as the *executive* part, and as the *head and sovereign*.

“The *art of printing* has only *varied the mode*; and though printing be *within* legal memory, we thought the *usage* since the invention of printing very material.

“Whoever looks into Mr. Yorke's argument, upon which the opinion of the court in that case in a great measure went; I do not say *throughout*, but in a *great measure*; will see the great pains he takes to shew the original property in the crown.

“Though the king may grant a *concurrent* right; for, in that case, the grant was of a concurrent right, and he might grant it to ten thousands; he might grant it to every member of the Stationers Company; he might grant it to every bookseller; we had no idea, ‘that the first edition of acts of parliament made the copy *common*.’

“And yet any man may transcribe an act of parliament or a record; and any person may make labourious searches and abstracts from records, and have a right to print them.

“Lord Hardwicke had before reasoned in the same way, in the case of Manby and others against Owen and others, on 8th of April, 1755, relating to the Sessions Paper. The plaintiffs had bought the Sessions Paper of my Lord Mayor, and had (I think) given him an hundred guineas for it: and upon an affidavit ‘that the Lord Mayor had always appointed the printers of that paper, and that it was usual for the Lord Mayor to take a sum of money for it, and that the defendant had pirated it;’ Lord Hardwicke considered the grant as property in the copy, and granted the injunction upon the foot of *property*; and never dreamt ‘that the first edition of it made it *common*.’ This was acquiesced under; and the defendants were not advised to proceed farther. Nothing is more manifest, than that the injunction proceeded upon the infringement of the plaintiff's property: for, as a *contempt of the court* of the Old Bailey, the court of Chancery would not have interfered; but they were of opinion ‘that the *copy* was *transferred* to the plaintiff, and that it was *not made common* by the first publication.’

“If

“ If the common law be so in *these* cases, it must also be so in the case of an *author*. All the reasoning, ‘ that subsequent editions should be *correct*,’ holds equally to an author ; his *name* ought not to be used, against his will. It is an injury, by a faulty, ignorant, and incorrect edition, to disgrace his work, and mislead the reader.

“ The copy of the *Hebrew Bible*, the *Greek Testament*, or the *Septuagint*, does not belong to the king ; it is *common* : but the English Translation he *bought* ; therefore it has been concluded to be *his property*.

“ If any man should turn the *Psalms*, or the writings of *Solomon*, or *Job*, into verse, the king could not stop the printing or sale of such a work : it is the author’s work. The king has no power or controul over the subject-matter ; his power rests in *property* : his whole right rests upon the foundation of *property in the copy* by the *common-law*. What *other* ground can there be for the king’s having a property in the *Latin Grammar* (which is one of his ancientest copies), than that it was originally composed at *his expence* ? Whatever the *common law* says of *property* in the king’s case, *from analogy to the case of authors*, must hold *conclusively*, in my apprehension, *with regard to authors*.

“ I always thought the objection from the * Act of Parliament the most *plausible*. It has generally struck, at *first view*. But, upon *consideration*, it is, I think, impossible to *imply* this Act into an *abolition* of the *common-law* right, if it *did* exist ; or into a declaration ‘ that *no* such right *ever* *existed*.’

“ The bill was brought in, upon the petition of the proprietors, to *secure* their property *for ever*, by *penalties* ; the only way in which *they thought* it *could* be secured, having *had no experience of any other*, there being no example of an action at law tried, or any idea ‘ that a bill would lie for an injunction and relief in equity.’

“ An alteration was made in the committee, to restrain the *perpetual* into a *temporary* security.

“ The argument drawn from the clause to regulate the *price* † of books,

* 8 Anne, c. 19.

† Sect 4. now repealed (by 12 Geo. II. c. 36. § 3.)

cannot hold. That clause goes to *all* books, is *perpetual*, and follows the act of H. VIII *.

“ The words ‘ *no longer*’ † add nothing to the *sense*, which is exactly the same whether these words are added or not.

“ The word ‘ *vesting*’ ‡, in the title, cannot be argued from as declaratory ‘ that there was *no* property *before*.’ The *title* is but once read ; and is no part of the act. In the *body*, the word ‘ *secured*’ is made use of.

“ Had there been the least intention to *take* or *declare* away every pretence of right at the *common law*, it would have been expressly enacted ; and there must have been a *new preamble*, totally different from that which now stands.

“ But the legislature has *not* left their meaning to be found out by *loose conjectures*. The *preamble* certainly proceeds upon the ground of a *right of property* having been *violated* ; and might be argued from, as an *allowance* or *confirmation* of such a right at the *common law*. The remedy enacted against the violation of it being *only temporary*, might be argued from, as *implying* ‘ there *existed* no right *but* what was secured by the act ;’ therefore an *express saving* is added, ‘ that nothing in this act contained shall extend, or be construed to extend, to *prejudice*, or *confirm* any right, &c. ;’ ‘ *any right* is manifestly any *other* right than the *term* secured by the act. The act speaks of *no* right whatsoever, *but* that of *authors*, or *derived* from *them* ; no *other* right could possibly be *prejudiced* or *confirmed* by any expression in the act. The words of the *saving* are adapted to this right : ‘ *book or copy* already printed, or *hereafter* to be printed ;’ they are not applicable to *prerogative* copies. If letters patent to an author or his assigns could give any right, they might come under the generality of the saving ; but so little was such a right in the *contemplation* of the legislature, that there is not a word about *patents* in the *whole* act. Could they have given any right, it was not *worth* saving, because it never exceeded fourteen years.

* 25 H. VIII. c. 15. § 4.

† Vide Sect. 1.

‡ Vide title, by vesting, &c.

It was strongly urged, 'that a common-law right could not exist; because there was *no* time from which it could be said to *attach* or *begin*:' whereas the *statute*-property was ascertained by and commenced from the *entry*.

"Undoubtedly, the previous entry is a *condition* upon which all the security given by the *statute* depends: and *if* every man was entitled to print, without the author's consent, *before* this act, nobody can be questioned for so printing *since* the act, before an entry. Nay, the offence being *newly created*, it can only be prosecuted by the *remedies prescribed*, and *within the limited time* of three months.

"But the court of *Chancery* has uniformly proceeded upon a *contrary* construction. They considered the act, *not* as creating a *new* offence, but as giving an *additional security* to a *proprietor* *grieved*; and give a relief *without regard* to any of the provisions in the act, whether the term was or was not expired. *No injunction* can be obtained, *till* the court is satisfied 'that the plaintiff has a *clear legal right*.' And where, for the sake of the relief, the Court of Chancery proceeds upon a ground of *common* or *statute* law, their judgements are precedents of high authority in *all* the courts of Westminster-hall."

His lordship adopted and referred to *other* observations made upon the act by the two judges who spoke first: and then concluded thus,

"I desire to be understood, that it is upon *this* special verdict I give my opinion. *Every remark* which has been made, as to what *is* and what is *not found*, I consider as *material*. The *variation* of any *one* of the circumstances may change the merits of the question: the variation of *some*, certainly would. Every case, where such variation arises, will stand upon its *own particular ground*; and will *not* be concluded by *this* judgement.

"The subject *at large* is exhausted: and therefore I have not gone into it. I have had frequent opportunities to consider of it. I have travelled in it for many years. I was counsel in most of the cases which have been cited from Chancery: I have copies of all, from the Register-Book. The first case of Milton's Paradise Lost, was upon my motion. I argued the second: which was solemnly argued, by one on each side. I argued the case of Mil-
lar against Kincaid, in the House of Lords. Many of the precedents were tried by my advice. The accurate and elaborate investigation of the matter in *this* cause, and in the former case of Tonson and Collins, has confirmed me in what I always inclined to think, 'That the Court of Chancery did
right,

right, in giving relief upon the foundation of a *legal property in authors*; independent of the entry, the term for years, and all the other provisions annexed to the security given by the act.

“ Therefore my opinion is, ‘ that *judgement* be for the *plaintiff*.’ And it must be *entered* * as on the day of the last argument of this case at the bar.”

A writ of error was afterwards brought: but the plaintiff in error, after assigning errors, suffered himself to be *nonprossed*. And the Lords Commissioners, after Trinity-Term, 1770, granted an injunction.

1774.

In February, 1774, the appeal from a decree of the Court of Chancery for ascertaining the right of Literary Property, wherein Donaldson and Donaldson were appellants, and Becket and others were respondents, for the decision of the House of Lords.—The case had been argued at great length, and the judges had given their opinions.—The motion then was to reverse a decree of the Court of Chancery, which had been made in favour of the perpetuity of the property.

The principal speakers were, lord Camden against the decree and lord Lyttelton in support of it.—Lord Mansfield, for obvious reasons, did not speak as a judge.—Upon a division the decree was ordered to be reversed, without costs.

The speeches of lord Mansfield, as a peer of this realm, on some important occasions, have been selected; and, without the introduction of a few of them, the author is not a little apprehensive that the history of the *legal life* of Lord Mansfield, if it may be so defined, would be deprived of one of its chief ornaments.

With gratitude, and with great pleasure, the Biographer acknowledges his obligations to a dignified civilian, the ingenious

* Vide 4th Burr. p. 2303.

contemporary of lord Mansfield, for an authentic copy of a speech made by his lordship the 3d of February, 1766, in the House of Lords, on the subject of American taxation, which, having been revised and corrected by the noble speaker himself, seems to have an additional value stampt upon it, if any allusion to the American stamp-act may be pardoned.

“ My Lords,

“ I shall speak to the question strictly as a matter of right; for, it is a proposition in its nature so perfectly distinct from the expediency of the tax, that it must necessarily be taken separate, if there is any true logic in the world; but of the expediency or in expediency I will say nothing. It will be time enough to speak upon that subject when it comes to be a question.

“ I shall also speak to the distinctions which have been taken, without any real difference, as to the nature of the tax; and I shall point out lastly the necessity there will be of exerting the force of the superior authority of government, if opposed by the subordinate part of it.

“ I am extremely sorry that the question has ever become necessary to be agitated, and that there should be a decision upon it. No one in this house will live long enough to see an end put to the mischief which will be the result of the doctrine which has been inculcated: but the arrow is shot, and the wound already given. I shall certainly avoid personal reflections: no one has had more cast upon him than myself; but I never was biased by any consideration of applause from without, in the discharge of my public duty; and, in giving my sentiments according to what I thought law, I have relied upon my own consciousness. It is with great pleasure I have heard the noble lord, who moved for the resolution, express himself in so manly and sensible a way, when he recommended a dispassionate debate, while, at the same time, he urged the necessity of the house coming to such a resolution with great dignity and propriety of argument.

“ I shall endeavour to clear away from the question all that mass of dissertation and learning displayed in arguments which have been fetched from speculative men who have written upon the subject of government, or from antient records, as being little to the purpose: I shall insist that these records are no proofs of our present constitution. A noble lord has taken up
his

his argument from the settlement of the constitution at the Revolution : I shall take up my argument from the constitution as it now is. The constitution of this country has been always in a moving state, either gaining or losing something : and with respect to the modes of taxation, when we get beyond the reign of Edward the First, or of king John, we are all in doubt and obscurity. The history of those times is full of uncertainties. In regard to the writs upon record, they were issued some of them according to law, and some not according to law ; and such were those concerning ship-money, to call assemblies to tax themselves, or to compel benevolences. Other taxes were raised from escuage, fees for knights service, and by other means arising out of the feudal system. Benevolences are contrary to law ; and it is well known how people resisted the demands of the crown in the case of ship-money, and were persecuted by the court ; and, if any set of men were to meet now to lend the king money, it would be contrary to law, and a breach of the rights of parliament. I shall answer the noble lord particularly upon the records he has quoted."

[He then answered, one by one, the writs and records which had been quoted by lord Camden.]

" With respect to the Marches of Wales, who were the borderers, privileged for assisting the king in his war against the Welsh in the mountains, their enjoying this privilege of taxing themselves was but of a short duration, and during the life of Edward the First, till the prince of Wales came to be the king ; and then they were annexed to the crown, and became subject to taxes like the rest of the dominions of England, and from thence came the custom, though unnecessary, of naming Wales and the town of Monmouth in all proclamations and in acts of parliament. Henry the Eighth was the first who issued writs for it to return two members to parliament. The crown exercised this right *ad libitum*, from whence arises the inequality of representation in our constitution at this day. Henry VIII. issued a writ to Calais to send one burgesses to parliament. One of the counties Palatine (I think he said Durham) was taxed fifty years to subsidies before it sent members to parliament. The clergy were at no time unrepresented in parliament. When they taxed themselves, it was done with the concurrence and consent of parliament, who permitted them to tax themselves upon their petition, the convocation sitting at the same time with the parliament ; they had too their representatives always sitting in this house, bishops and abbots ; and in the other house they were at no time without a

right of voting singly for the election of members, so that the argument, fetched from the case of the clergy, is not an argument of any force, because they were at no time unrepresented here.

“ The reasoning about the colonies of Great Britain, drawn from the colonies of antiquity, is a mere useless display of learning ; for, the colonies of the Tyrians in Africa, and of the Greeks in Asia, were totally different from our system. No nation before ourselves formed any regular system of colonization ; but the Romans and their system was a military one, and of garrisons placed in the principal towns of the conquered provinces. The states of Holland were not colonies of Spain, but they were states dependent upon the House of Austria in a feudal dependence. Nothing could be more different from our colonies than that flock of men, as they have been called, who came from the North, and poured into Europe. These emigrants renounced all laws, all protection, all connection with their mother-countries : they chose their leaders, and marched under their banners to seek their fortunes and establish new kingdoms upon the ruins of the Roman empire ; whereas our colonies, on the contrary, emigrated under the sanction of the crown and parliament. They were modelled gradually into their present forms, respectively, by charters, grants, and statutes ; but they were never separated from the mother-country, or so emancipated as to become *sui juris*. There are several sorts of colonies in British America, the charter-colonies, the proprietary governments, and the king's colonies. The first colonies were the charter-colonies, such as the Virginia company ; and these companies, had among their directors, members of the privy council and of both houses of parliament ; they were under the authority of the privy council, and had agents resident here responsible for their proceedings. So much were they considered as belonging to the crown and not to the king personally (for there is a great difference, though few people attend to it), that when the two houses, in the time of Charles the First, were going to pass a bill concerning the colonies, a message was sent to them by the king, that they were the king's colonies, and that the bill was unnecessary, for that the privy council would take order about them ; and the bill never had the royal assent. The commonwealth-parliament, as soon as it was settled, were very early jealous of the colonies separating themselves from them, and passed a resolution or act, and it is a question whether it is not in force now, to declare and establish the authority of England over its colonies. But if there was no express law, or reason, founded upon any necessary inference

ference from an exprefs law, yet the ufage alone would be fufficient to fupport that authority: for, have not the colonies fubmitted ever fince their firft eftablifhment to the jurifdiction of the mother-country? In all queftions of property, the appeals from the colonies have been to the privy council here; and fuch caufes have been determined, not by the law of the colonies, but by the law of England. A very little while ago there was an appeal on a queftion of limitation in a devife of land with remainders; and, notwithstanding the intention of the teftator appeared very clear, yet the cafe was determined contrary to it, and that the land fhould pafs according to the law of England. The colonies have been obliged to recur very frequently to the jurifdiction here to fettle the difputes among their own governments; I well remember feveral references on this head, when the late lord Hardwicke was attorney-general, and fir Clement Wearg follicitor-general. New Hampshire and Connecticut were in blood about their differences; Virginia and Maryland were in arms againft each other. This fhews the neceffity of one fuperior decifive jurifdiction, to which all fubordinate jurifdictions may recur. Nothing, my lords, could be more fatal to the peace of the colonies at any time, than the parliament giving up its authority over them, for in fuch a cafe there muft be an intire diffolution of government. Confidering how the colonies are compofed, it is eafy to forefee there would be no end of feuds and factions among the feveral feparate governments, when once there fhall be no one government here or there of fufficient force or authority to decide their mutual differences; and, government being diffolved, nothing remains but that the colonies muft either change their conftitution, and take fome new form or government, or fall under fome foreign power. At prefent the feveral forms of their conftitution are very various, having been produced, as all governments have been originally, by accident and circumftances. The forms of government in every colony were adapted, from time to time, according to the fize of the colony; and fo have been extended again, from time to time, as the numbers of their inhabitants and their commercial connections outgrew the firft model. In fome colonies, at firft there was only a governor affifted by two or three counfel; then more were added, then courts of juftice were erected, then affemblies were created. Some things were done by inftructions from the fecretaries of ftate, other things were done by order of the king and council, and other things by commiffions under the great feal. It is

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observable, that, in consequence of these establishments from time to time, and of the dependency of these governments upon the supreme legislature at home, the lenity of each government in the colonies has been extreme towards the subject; and a very great inducement it has been to people to come and settle in them. But, if all those governments which are now independent of each other should become independent of the mother-country, I am afraid that the inhabitants of the colonies are very little aware of the consequences; they would feel in that case very soon the hand of power more heavy upon them in their own governments than they have yet done, or have ever imagined.

“The constitutions of the different colonies are made up of different principles, and must remain dependent, from the necessity of things, and their relations upon the jurisdiction of the mother-country; or they must be totally dismembered from it, and form a league of union among themselves against it, which could not be effected without great violences. No one ever thought the contrary, till the trumpet of sedition has been blown. Acts of parliament have been made, not only without a doubt of their legality, but with universal applause, the great object of which has been ultimately to fix the trade of the colonies, so as to center in the bosom of that country from whence they took their original. The Navigation-Act shut up their intercourse with foreign countries. Their ports have been made subject to customs and regulations, which have cramped and diminished their trade; and duties have been laid, affecting the very inmost parts of their commerce, and, among others, that of the post; yet all these have been submitted to peaceably, and no one ever thought till now of this doctrine, that the colonies are not to be taxed, regulated, or bound by parliament. A few particular merchants were then, as now, displeased at restrictions which did not permit them to make the greatest possible advantages of their commerce in their own private and peculiar branches; but, though these few merchants might think themselves losers in articles which they had no right to gain, as being prejudicial to the general and national system, yet I must observe, that the colonies, upon the whole, were benefited by these laws, because these restrictive laws, founded upon principles of the most solid policy, flung a great weight of naval force into the hands of the mother-country, which was to protect its colonies, and without an union with which the colonies must have been entirely weak and defenceless, but which became relatively great, subor-

subordinately, and in proportion as the mother-country advanced in superiority over the rest of the maritime powers in Europe, to which both mutually contributed and of which both have reaped a benefit, equal to the natural and just relation in which they both stand reciprocally, of dependency on one side, and protection on the other.

“ There can be no doubt, my lords, but that the inhabitants of the colonies are as much represented in parliament as the greatest part of the people of England are represented; among nine millions of whom there are eight which have no votes in electing members of parliament. Every objection therefore to the dependency of the colonies upon parliament, which arises to it upon the ground of representation, goes to the whole present constitution of Great Britain; and I suppose it is not meant to new-model that too: people may form speculative ideas of perfection, and indulge their own fancies or those of other men. Every man in this country has his particular notion of liberty; but perfection never did, and never can, exist in any human institution; to what purpose then are arguments drawn from a distinction, in which there is no real difference, of a virtual and actual representation? A member of parliament, chosen for any borough, represents not only the constituents and inhabitants of that particular place, but he represents the inhabitants of every other borough in Great Britain. He represents the city of London, and all other the commons of this land, and the inhabitants of all the colonies and dominions of Great Britain, and is, in duty and conscience, bound to take care of their interests.

“ I have mentioned the customs and the post-tax; it leads me to answer another distinction, as false as the above, the distinction of internal and external taxes. The noble lord, who quoted so much law, and denied upon those grounds the right of the parliament of Great Britain to lay internal taxes upon the colonies, allowed at the same time that restrictions upon trade, and duties upon the ports, were legal. But I cannot see a real difference in this distinction; for, I hold it to be true, that a tax laid in any place is like a pebble falling into, and making a circle in, a lake, till one circle produces and gives motion to another, and the whole circumference is agitated from the center; for, nothing can be more clear than that a tax of ten or twenty *per cent.* laid upon tobacco, either in the ports of Virginia or London, is a duty laid upon the inland plantations of Virginia, a hundred miles from the sea, wheresoever the tobacco grows.

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“ I do not deny but that a tax may be laid injudiciously and injuriously, and that people in such a case may have a right to complain; but the nature of the tax is not now the question; whenever it comes to be one, I am for lenity. I would have no blood drawn. There is, I am satisfied, no occasion for any to be drawn. A little time and experience of the inconveniences and miseries of anarchy may bring people to their senses.

“ With respect to what has been said or written upon this subject, I differ from the noble lord, who spoke of Mr. Otys and his book with contempt, though he maintained the same doctrine in some points, although in others he carried it farther than Otys himself; who allows every where the supremacy of the crown over the colonies. No man on such a subject is contemptible. Otys is a man of consequence among the people there. They have chosen him for one of their deputies at the congress and general meeting from the respective governments. It was said, the man is mad. What then? One madman often makes many. Massaniello was mad. Nobody doubts it; yet, for all that, he overturned the government of Naples. Madness is catching in all popular assemblies, and upon all popular matters. The book is full of wildness. I never read it till a few days ago, for I seldom look into such things; I never was actually acquainted with the contents of the Stamp-Act, till I sent for it on purpose to read it before the debate was expected. With respect to authorities in *another house*, I know nothing of them. I believe that I have not been in that house more than once since I had the honor to be called up to this; and, if I did not know any thing that passed in the other house, I could not and would not mention it as an authority here. I ought not to mention any such authority; I should think it beneath my own and your lordships' dignity to speak of it.

“ I am far from bearing any ill-will to the Americans; they are a very good people, and I have long known them; I began life with them, and owe much to them, having been much concerned in the plantation-causes before the privy council, and so I became a good deal acquainted with American affairs and people. I dare say, their heat will soon be over, when they come to feel a little the consequences of their opposition to the legislature. Anarchy always cures itself; but the fermentation will continue so much the longer, while hot-headed men there find that there are persons of weight and character to support and justify them here.

“ Indeed

“ Indeed, if the disturbances should continue for a great length of time, force must be the consequence, an application adequate to the mischief, and arising out of the necessity of the case; for, force is only the difference between a superior and subordinate jurisdiction. In the former, the whole force of the legislature resides collectively, and when it ceases to reside the whole connection is dissolved. It will, indeed, be to very little purpose that we sit here enacting laws, and making resolutions, if the inferior will not obey them, or if we neither can nor dare enforce them; for then, and then, I say, of necessity the matter comes to the sword. If the offspring are grown too big and too resolute to obey the parent, you must try which is the strongest, and exert all the powers of the mother-country to decide the contest.

“ I am satisfied, notwithstanding, that time and a wise and steady conduct may prevent those extremities which would be fatal to both. I remember well when it was the violent humour of the times to decry standing armies and garrisons, as dangerous and incompatible with the liberty of the subject. Nothing would do but a regular militia. The militia are embodied; they march, and, no sooner was the militia-law thus put into execution, but it was then said to be an intolerable burthen upon the subject, and that it would fall, sooner or later, into the hands of the crown. That was the language, and many counties petitioned against it. This may be the case with the colonies. In many places they begin already to feel the effects of their resistance to government. Interest very soon divides mercantile people; and, although there may be some mad, enthusiastic, or ill-designing people in the colonies, yet I am convinced that the greatest bulk, who have understanding and property, are still well-affected to the mother-country. You have, my lords, many friends still in the colonies; and take care that you do not, by *abdicating your own authority*, desert them and yourselves, and lose them for ever.

“ In all popular tumults the worst men bear the sway at first. Moderate and good men are often silent for fear or modesty; who, in due time, may declare themselves. Those who have any property to lose are sufficiently alarmed already at the progress of these public violences and violations, to which every man's dwelling, person, and property, are hourly exposed. Numbers of such valuable men and good subjects are ready and willing to

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declare themselves for the support of government in due time, if government does not fling away its own authority.

“ My lords, the parliament of Great Britain has its rights over the colonies; but it may abdicate its rights.

“ There was a thing which I forgot to mention; I mean, the manuscript quoted by the noble lord. He tells you, that it is there said, that, if the act concerning Ireland had passed, the parliament might have abdicated its rights as to Ireland. In the first place, I heartily wish, my lords, that Ireland had not been named at a time when that country is of a temper and in a situation so difficult to be governed; and when we have already here so much weight upon our hands, encumbered with the extensiveness, variety, and importance, of so many objects in a vast and too busy empire; and the national system shattered and exhausted by a long, bloody, and expensive war, but more so by our divisions at home, and a fluctuation of councils. I wish Ireland therefore never had been named.

“ I pay as much respect as any man to the memory of lord chief justice Hale; but I did not know that he had ever written upon the subject; and I differ very much from thinking with the noble lord, that this manuscript ought to be published; so far am I from it, that I wish the manuscript had never been named; for, Ireland is too tender a subject to be touched. The case of Ireland is as different as possible from that of our colonies. Ireland was a conquered country; it had its *pacta conventa*, and its *regalia*. But to what purpose is it to mention the manuscript? It is but the opinion of one man. When it was written, or for what particular object it was written, does not appear. It might possibly be only a work of youth, or an exercise of the understanding, in founding and trying a question problematically. All people, when they first enter professions, make their collections pretty early in life; and the manuscript may be of that sort. However, be it what it may, the opinion is but problematical; for, the act to which the writer refers never passed, and lord Hale only said, that, if it had passed, the parliament might have abdicated their right.

“ But, my lords, I shall make this application of it. You may abdicate your right over the colonies. Take care, my lords, how you do so; for, such an act will be irrevocable. Proceed then, my lords, with spirit and firmness; and, when you shall have established your authority, it will then be a time

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to shew your lenity. The Americans, as I said before, are a very good people, and I wish them exceeding well; but they are heated and inflamed. The noble lord who spoke before concluded with a prayer; I cannot end better than by saying to it, amen; and in the words of Maurice prince of Orange concerning the Hollanders, "God bless this industrious, frugal, and well-meaning, but easily deluded people."

Lord Camden rose, and replied to the following effect:

"That the noble lord was much mistaken concerning the manuscript; that he would readily shew it to him; and, for the present, he did assure him and the rest of their lordships, that it was a work, not of youth, but written by lord Hale in the height and vigour of his understanding, with great deliberation and self-conviction of the truth of what he advanced."

1767.

In 1767, the cause between the city of *London* and the *Dissenters* was brought to a conclusion in the House of Lords.

The learned Dr. Philip Furneaux, in his Preface to the second Edition of Letters to the honorable Mr. Justice Blackstone, concerning his exposition of the act of toleration, makes his grateful acknowledgements to lord Mansfield in the following sentences:

"I think myself therefore singularly happy in the opportunity of publishing an authentic copy of the celebrated speech of lord Mansfield in the House of Lords in the Sheriffs case; a speech which in point of arrangement, weight of argument, perspicuity, and energy, both of expression and sentiment, hath seldom, I believe, been equalled on any occasion, unless by the noble lord himself.

"And I here make my most humble and grateful acknowledgements to that truly great man, for the peculiar honor he hath done me, in permitting me to convey to the world a copy of that admirable model of juridical and senatorial eloquence.

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"I mentioned in the former edition of my letters having in my possession a copy, which by many very competent judges, who were present when the speech was delivered, and some of them members of the supreme court by which the cause was determined, was thought to be not inaccurate; an imperfect transcript of which having, entirely without my knowledge, appeared in an evening-paper, I was desirous, if I could obtain his lordship's permission, to favour the world with a more faithful copy. I accordingly waited on his lordship, and had my request in the most condescending manner granted. Indeed his lordship, when he delivered that incomparable speech, had no notes, and had afterwards taken no memorandums; but, having read the copy, he declared his approbation of it."

After this detail, it is presumed that the reader will not be displeased to find the speech subjoined of lord *Mansfield* in the House of Lords, in the case of the *Chamberlain of London* against *Allen Evans, Esq.*

"My Lords,

"As I made the motion for taking the opinion of the learned judges, and proposed the question your lordships have been pleased to put to them; it may be expected that I should make some farther motion, in consequence of the opinions they have delivered.

"In moving for the opinion of the judges, I had two views. The first was, that the house might have the benefit of their assistance, in forming a right judgement in this cause now before us, upon this writ of error. The next was, that, the question being fully discussed, the grounds of our judgement, together with their exceptions, limitations, and restrictions, might be clearly and certainly known, as a rule to be followed hereafter in all future cases of the like nature; and this determined me as to the manner of wording the question, 'how far the defendant might, in the present case, be allowed to plead his disability in bar of the action brought against him?'

"The question, thus worded, shews the point upon which your lordships thought this cause turned; and the answer necessarily fixes a criterion, under what circumstances, and by what persons, such a disability may be pleaded as an exemption from the penalty inflicted by this bye-law, upon those who decline taking upon them the office of sheriff.

"In every view in which I have been able to consider this matter, I think this action cannot be supported.

"If

“ If they rely on the Corporation-act, by the literal and express provision of that act no person can be elected, who hath not within a year taken the sacrament in the Church of England : The defendant hath not taken the sacrament within a year; he is not therefore elected. Here they fail.

“ If they ground it on the general design of the legislature in passing the Corporation-act; the design was, to exclude Dissenters from office, and disable them from serving. For in those times, when a spirit of Intolerance prevailed, and severe measures were pursued, the Dissenters were reputed and treated as persons ill-affected and dangerous to the government : The defendant therefore, a Dissenter, and in the eye of this law a person dangerous and ill-affected, is excluded from office, and disabled from serving. Here they fail.

“ If they ground the action on their own bye-law; since that bye-law was professedly made to procure fit and able persons to serve the office, and the defendant is not fit and able, being expressly disabled by statute law; here too they fail.

“ If they ground it on his disability, being owing to a neglect of taking the Sacrament at church, when he ought to have done it, the Toleration-act having freed the Dissenters from all obligation to take the Sacrament at church; the defendant is guilty of no neglect, no criminal neglect; here therefore they fail.

“ These points, my lords, will appear clear and plain.

“ The Corporation-act, pleaded by the defendant as rendering him ineligible to this office, and incapable of taking it upon him, was most certainly intended by the legislature to prohibit the persons therein described being elected to any corporation-offices, and to disable them from taking such offices upon them. The act had two parts: first, it appointed a commission for turning out all that were at that time in office, who would not comply with what was required as the condition of their continuance therein, and even gave a power to turn them out though they should comply; and then it farther enacted, that, from the termination of that commission, no person hereafter, who had not taken the sacrament according to the rites of the Church of England within one year preceding the time of such election, should be placed, chosen, or elected, into any office of, or belonging to, the government of any corporation; and this was done, as it was expressly declared in the preamble to the act, in order to perpetuate the succession in

corporations in the hands of persons well-affected to the government in church and state.

“ It was not their design, as hath been said, ‘ to bring such persons into corporations by inducing them to take the Sacrament in the Church of England ;’ the legislature did not mean to tempt persons who were ill-affected to the government occasionally to conform. It was not, I say, their design to bring them in ; they could not trust them, lest they should use the power of their offices to distress and annoy the state. And the reason is alleged in the act itself ; it was because there were “ evil spirits” amongst them ; and they were afraid of evil spirits, and determined to keep them out ; and therefore they put it out of the power of electors to choose such persons, and out of their power to serve ; and accordingly prescribed a mark or character, laid down a description whereby they should be known and distinguished by their conduct previous to such election. Instead of appointing a condition of their serving the office, resulting from their future conduct, or some consequent action to be performed by them ; they declared such persons incapable of being chosen as had not taken the Sacrament in the church within a year before such election ; and, without this mark of their affection to the church, they could not be in office, and there could be no election ; but, as the law then stood, no man could have pleaded this disability, resulting from the Corporation-act, in bar of such an action as is now brought against the defendant ; because this disability was owing to what was then in the eye of the law a crime ; every man being required by the canon-law, received and confirmed by the statute-law, to take the sacrament in the church at least once a year. The law would not permit a man to say, that he had not taken the sacrament in the Church of England, and he could not be allowed to plead it in bar of any action brought against him.

“ But the case is quite altered since the act of Toleration. It is now no crime for a man, who is within the description of that act, to say he is a Dissenter ; nor is it any crime for him not to take the sacrament according to the rites of the Church of England ; nay the crime is, if he does it contrary to the dictates of his conscience.

“ If it is a crime not to take the sacrament at church, it must be a crime by some law, which must be either common or statute law, the canon-law enforcing it depending wholly upon the statute-law. Now the statute-law

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is repealed as to persons capable of pleading that they are so and so qualified; and therefore the canon-law is repealed with regard to those persons. If it is a crime by common law, it must be so either by usage or principle.

“ There is no usage or custom, independent of positive law, which makes nonconformity a crime.

“ The eternal principles of natural religion are part of the common law. The essential principles of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them, may be prosecuted at common law. But it cannot be shewn, from the principles of natural or revealed religion, that, independent of positive law, temporal punishments ought to be inflicted for mere opinions with respect to particular modes of worship.

“ Persecution for a sincere, though erroneous, conscience, is not to be deduced from reason or the fitness of things; it can only stand upon positive law.

“ It hath been said, that ‘ the Toleration-act only amounts to an exemption of the Protestant Dissenters from the penalties of certain laws therein particularly mentioned, and to nothing more; that, if it had been intended to bear, and to have any operation upon the Corporation-act, the Corporation-act ought to have been mentioned therein; and there ought to have been some enacting clause, exempting Dissenters from prosecution in consequence of this act, and enabling them to plead their not having received the sacrament according to the rites of the Church of England in bar of such action.’ But this is much too limited and narrow a conception of the Toleration-act, which amounts consequentially to a great deal more than this; and it hath consequentially an inference and operation upon the Corporation-act in particular. The Toleration-act renders that, which was illegal before, now legal; the Dissenters way of worship is permitted and allowed by this act; it is not only exempted from punishment, but rendered innocent and lawful; it is established; it is put under the protection, and is not merely under the connivance, of the law. In case those who are appointed by law to register dissenting places of worship refuse on any pretence to do it, we must, upon application, send a Mandamus to compel them.

“ Now there cannot be plainer position, than that the law protects nothing in that very respect in which it is in the eye of the law at the same time a crime. Dissenters, within the description of the Toleration-act, are restored to a legal consideration and capacity; and a hundred consequences will

will from thence follow which are not mentioned in the act. For instance, previous to the Toleration-act, it was unlawful to devise any legacy for the support of dissenting congregations, or for the benefit of dissenting ministers; for, the law knew no such assemblies, and no such persons; and such a devise was absolutely void, being left to what the law called superstitious purposes. But will it be said in any court in England, that such a devise is not a good and valid one now? And yet there is nothing said of this in the Toleration-act. By this act the Dissenters are freed not only from the pains and penalties of the laws therein particularly specified, but from all ecclesiastical censures, and from all penalty and punishment whatsoever, on account of their nonconformity; which is allowed and protected by this act, and is therefore in the eye of the law no longer a crime. Now, if the defendant may say he is a dissenter, if the law doth not stop his mouth, if he may declare that he hath not taken the sacrament according to the rites of the church of England, without being considered as criminal; if, I say, his mouth is not stopped by the law; he may then plead his not having taken the sacrament according to the rites of the church of England, in bar of this action. It is such a disability as doth not leave him liable to any action, or to any penalty whatsoever.

“It is indeed said to be ‘a maxim in law, that a man shall not be allowed to disable himself.’ But, when this maxim is applied to the present case, it is laid down in too large a sense; when it is extended to comprehend a legal disability, it is taken in too great a latitude. What! shall not a man be allowed to plead, that he is not fit and able? These words are inserted in the bye-law, as the ground of making it; and in the Plaintiff’s declaration, as the ground of his action against the defendant: it is alleged, that the defendant was fit and able, and that he refused to serve, not having a reasonable excuse. It is certain, and it is hereby in effect admitted, that if he is not fit and able, and that if he hath a reasonable excuse, he may plead it in bar of this action. Surely he might plead, that he was not worth £.15,000. provided that was really the case, as a circumstance that would render him not fit and able. And if the law allows him to say, that he hath not taken the sacrament according to the rites of the church of England, being within the description of the Toleration-act, he may plead that likewise to shew that he is not fit and able: It is a reasonable, it is a lawful excuse.

“My Lords, the meaning of this maxim, ‘That a man shall not disable himself,’ is solely this, That a man shall not disable himself by his own wilful

ful crime: and such a disability the law will not allow him to plead. If a man contracts to sell an estate to any person upon certain terms at such a time, and in the mean time he sells it to another, he shall not be allowed to say, 'Sir, I cannot fulfil my contract; it is out of my power; I have sold my estate to another.' Such a plea would be no bar to an action, because the act of his selling it to another is the very breach of contract. So likewise a man who hath promised marriage to one lady, and afterwards marries another, cannot plead in bar of a prosecution from the first lady that he is already married; because his marrying the second lady is the very breach of promise to the first. A man shall not be allowed to plead that he was drunk, in bar of a criminal prosecution, though perhaps he was at the time as incapable of the exercise of reason as if he had been insane, because his drunkenness was itself a crime: he shall not be allowed to excuse one crime by another. The Roman soldier, who cut off his thumbs, was not suffered to plead his disability for the service, to procure his dismissal with impunity: because his incapacity was designedly brought on him by his own wilful fault. And I am glad to observe so good an agreement among the judges upon this point, who have stated it with great precision and clearness.

"When it was said therefore that 'a man cannot plead his crime, in excuse for not doing what he is by law required to do,' it only amounts to this, that he cannot plead in excuse what, when pleaded, is no excuse: but there is not in this the shadow of an objection to his pleading what is an excuse, pleading a legal disqualification. If he is nominated to be a justice of the peace, he may say, I cannot be a justice of the peace, for I have not an hundred pounds a-year. In like manner a dissenter may plead, I have not qualified, and I cannot qualify, and am not obliged to qualify; and you have no right to fine me for not serving.

"It hath been said, that 'the King hath a right to the service of all his subjects.' And this assertion is very true, provided it be properly qualified. For surely, against the operation of this general right in particular cases, a man may plead a natural or civil disability. May not a man plead, that he was upon the high seas? May not idiocy or lunacy be pleaded? which are natural disabilities: or a judgement of a court of law? and much more a judgement of parliament? which are civil disabilities.

“It hath been said to be ‘a maxim that no man can plead, his being a lunatic, to avoid a deed executed, or excuse an act done, at that time; because,’ it is said, ‘if he was a lunatic he could not remember any action he did during the period of his insanity;’ and this was doctrine formerly laid down by some judges: but I am glad to find, that of late it hath been generally exploded; for, the reason assigned for it is, in my opinion, wholly insufficient to support it; because, though he could not remember what passed during his insanity, yet he might justly say, if he ever executed such a deed, or did such an action, it must have been during his confinement or lunacy; for he did not do it either before or since that time.

“As to the case in which a man’s plea of insanity was actually set aside, it was nothing more than this: it was when they pleaded *ore tenus*; the man pleaded, that he were at the time out of his senses. It was replied, How do you know that you was out of your senses? No man that is so knows himself to be so. And accordingly his plea was upon this quibble set aside; not because it was a valid one, if he was out of his senses; but because they concluded he was not out of his senses. If he had alleged, that he was at that time confined, being apprehended to be out of his senses; no advantage could have been taken of his manner of expressing himself; and his plea must have been allowed to be good.

“As to Larwood’s case, he was not allowed the benefit of the Toleration-act, because he did not plead it. If he had insisted on his right to the benefit of it in his plea, the judgement must have been different.

“His inserting it in his replication was not allowed, not because it was not an allegation that would have excused him, if it had been originally taken notice of in his plea, but because its being only mentioned afterwards was a departure from his plea.

“In the case of the mayor of Guilford, the Toleration-act was pleaded, the plea was allowed good, the disability being esteemed a lawful one; and the judgement was right.

“And here the defendant hath likewise insisted on his right to the benefit of the Toleration-act in his plea; he saith he is *bona fide* a dissenter, within the description of the Toleration-act; that he hath taken the oaths, and subscribed the declaration, required by that act, to shew that he is not a Popish recusant; that he hath never received the sacrament according to the rights of the Church of England, and that he cannot in conscience do it; and that

for more than fifty years past he hath not been present at church at the celebration of the established worship, but hath constantly received the sacrament and attended Divine Service among the Protestant Dissenters; and these facts are not denied by the plaintiff, though they might easily have been traversed; and it was incumbent upon them to have done it, if they had not known they should certainly fail in it. There can be no doubt therefore that the defendant is a Dissenter, an honest conscientious Dissenter; and no conscientious Dissenter can take the sacrament at church: the defendant saith he cannot do it, and he is not obliged to do it. And as this is the case, as the law allows him to say this, as it hath not stopped his mouth; the plea which he makes is a lawful plea, his disability being through no crime or fault of his own; I say, he is disabled by act of parliament, without the concurrence or intervention of any fault or crime of his own; and therefore he may plead this disability in bar of the present action.

“The case of ‘Atheists and Infidels’ is out of the present question; and they come not within the description of the Toleration-act. And this is the sole point to be enquired into, in all cases of the like nature with that of the defendant, who here pleads the Toleration-act; is the man *bonâ fide* a Dissenter within the description of that act? If not, he cannot plead his disability in consequence of his not having taken the sacrament in the Church of England; if he is, he may lawfully and with effect plead it in bar of such an action; and the question, on which this distinction is grounded, must be tried by a jury.

“It hath been said, that, ‘this being a matter between God and a man’s own conscience, it cannot come under the cognizance of a jury;’ but certainly it may; and, though God alone is the absolute judge of a man’s religious profession, and of his conscience, yet there are some marks even of sincerity; among which there is none more certain than consistency. Surely a man’s sincerity may be judged of by overt-acts; it is a just and excellent maxim, which will hold good in this as in all other cases, ‘by their fruits ye shall know them.’ Do they, I do not say go to meeting now and then, but do they frequent the meeting-house? Do they join generally and stately in Divine Worship with Dissenting Congregations? Whether they do, or not, may be ascertained by their neighbours, and by those who frequent the same places of worship. In case a man hath occasionally conformed for the sake of places of trust and profit; in that case, I imagine, a jury would not hesitate in their verdict. If a man then alleges he is a Dis-

fenter, and claims the protection and the advantages of the Toleration-act, a jury may justly find that he is not a Dissenter within the description of the Toleration-act, so far as to render his disability a lawful one. If he takes the sacrament for his interest, the jury may fairly conclude that this scruple of conscience is a false pretence when set up to avoid a burthen.

“The defendant in the present case pleads, that he is a Dissenter within the description of the Toleration-act; that he hath not taken the sacrament in the Church of England within one year preceding the time of his supposed election, nor ever in his whole life; and that he cannot in conscience do it.

“Conscience is not controulable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction, and are only calculated to make hypocrites or martyrs.

“My lords, there never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions: for Atheism, Blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law; but bare nonconformity is no sin by the common law; and all positive laws inflicting any pains or penalties for nonconformity to the established rites and modes, are repealed by the act of Toleration; and Dissenters are thereby exempted from all ecclesiastical censures.

“What bloodshed and confusion have been occasioned, from the reign of Henry the Fourth, when the first penal statutes were enacted, down to the Revolution in this kingdom, by laws made to force conscience. There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against Natural Religion, Revealed Religion, and sound Policy.

“Sad experience, and a large mind, taught that great man, the President De Thou, this doctrine. Let any man read the many admirable things which, though a Papist, he hath dared to advance upon the subject, in the dedication of his History to Harry the Fourth of France (which I never read without rapture); and he will be fully convinced, not only how cruel, but how impolitic, it is to prosecute for religious opinions. I am sorry, that of late his

country-

countrymen have begun to open their eyes, see their error, and adopt his sentiments. I should not have broken my heart (I hope I may say so without breach of Christian charity) if France had continued to cherish the Jesuits, and to persecute the Huguenots.

“ There was no occasion to revoke the edict of Nantz; the Jesuits needed only to have advised a plan similar to what is contended for in the present case; make a law to render them incapable of office; make another to punish them for not serving. If they accept, punish them (for, it is admitted on all hands, that the defendant, in the cause before your lordships is prosecutable for taking the office upon him). If they accept, punish them; if they refuse, punish them; if they say yes, punish them; if they say no, punish them. My lords, this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as that of Procrustes; if they are too short, stretch them; if they are too long, lop them. Small would have been their consolation to have been gravely told, the edict of Nantz is kept inviolable; you have the full benefit of that act of Toleration, you may take the sacrament in your own way with impunity; you are not compelled to go to mass. Was this case but told in the City of London, as of a proceeding in France, how would they exclaim against the Jesuitical distinction? And yet in truth it comes from themselves; the Jesuits never thought of it. When they meant to persecute by their act of Toleration, the edict of Nantz was repealed.

“ This bye-law, by which the Dissenters are to be reduced to this wretched dilemma, is a bye-law of the city, a local corporation, contrary to an act of parliament, which is the law of the land; a modern bye-law, of very modern date, made long since the Corporation-act, long since the Toleration-act, in the face of them; for they knew these laws were in being. It was made in some year in the reign of the late king, I forget which; but it was made about the time of *building the mansion-house*. Now, if it could be supposed the city have a power of making such a bye-law it would entirely subvert the Toleration-act, the design of which was to exempt the Dissenters from all penalties; for by such a bye-law they have it in their power to make every Dissenter pay a fine of six hundred pounds, or any sum they please; for it amounts to that.

“ The professed design of making this bye-law was to get fit and able persons to serve the office; and the plaintiff sets forth in his declaration, that, if the Dissenters are excluded, they shall want fit and able persons to serve the office;

office ; but, were I to deliver my own suspicion, it would be, that they did not so much wish for their services as for their fines. Dissenters have been appointed to this office, one who was blind, another who was bed-ridden ; not, I suppose, on account of their being fit and able to serve the office. No ; they were disabled both by nature and by law.

“ We had a case lately in the courts below of a person chosen mayor of a corporation while he was beyond the seas with his majesty's troops in America, and they knew him to be so. Did they want him to serve the office ? No ; it was impossible. But they had a mind to continue the former mayor a year longer, and to have a pretence for setting aside him who was now chosen, on all future occasions, as having been elected before.

“ In the cause before your lordships, the defendant was, by law, incapable at the time of his pretended election ; and it is my firm persuasion, that he was chosen because he was incapable. If he had been capable, he had not been chosen ; for they did not want him to serve the office. They chose him because, without a breach of the law, and an usurpation on the crown, he could not serve the office. They chose him, that he might fall under the penalty of their bye-law, made to serve a particular purpose ; in opposition to which, and to avoid the fine thereby imposed, he hath pleaded a legal disability, grounded on two acts of parliament. As I am of opinion that his plea is good, I conclude with moving your lordships,

“ That the judgement be affirmed.”

The judgement was immediately affirmed, *nemine contradicente* ; and the entry in the Journal is in the following words :

“ *Die Mercurii, 4^o Februarii, 1767.*

“ It is ordered and adjudged, by the lords spiritual and temporal in parliament assembled, That the judgement given by the commissioners' delegates appointed to hear the errors in a judgement given in the sheriff's court, London, and affirmed by the court of Hustings, reversing the judgement of the Sheriff's court and court of Hustings, be, and the same is hereby, affirmed ; and that the record be remitted.

This

This great occasion was not the first wherein lord Mansfield interested himself in behalf of the Protestant Dissenters. In January 1762, on a motion for a Mandamus, in the case of the King against Barker and others, to the trustees of a dissenting meeting-house at Plymouth, requiring them to admit a certain person as pastor, minister, or preacher there; and on its being very strenuously opposed by part of the congregation and their counsel; lord Mansfield took occasion, first, to define the nature of a Mandamus, declaring,

“That it was a Prerogative-Writ, to the aid of which the subject is entitled, upon a proper case previously shewn to the satisfaction of the court. The original nature of the writ, ‘*Nos A. B. debitam & festinam justitiam in hac parte fieri volentes ut est justum*,’ proves that the court ought to assist by a Mandamus upon reasons of justice. It ought also to assist upon reasons of policy, to preserve peace, order, and good government. It was introduced to prevent disorder, from a failure of justice and defect of police; therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

“Within the last century it has been liberally interposed for the benefit of the subject and advancement of justice.

“The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a *right* and *no other* specific remedy, *this* should not be denied.

“Writs of Mandamus have been granted to admit *lecturers, clerks, sextons, and scavengers*, &c. to restore an alderman to precedence, an attorney to practice in an inferior court, &c.

“*Since* the Act of Toleration, it ought to be extended to protect an endowed pastor of Protestant Dissenters, from analogy and the reason of the thing.

“The *right itself* being *recent*, there can be no *direct antient* precedent; but every case of a lecturer, preacher, schoolmaster, curate, chaplain, is in point.

“Here is a *function* with *emoluments*, and no specific legal remedy. The right depends upon election; which interests all the voters.

“The

“The question is of a nature to inflame men’s passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the court deny this remedy, the congregation may be tempted to resist violence by force. A dispute who shall preach Christian charity’ may well raise implacable feuds and animosities, in breach of the public peace, to the reproach of government, and the scandal of religion. To deny this writ, would be putting Protestant Dissenters and their religious worship out of the protection of the law. This case is *entitled* to that protection, and cannot have it in any *other* mode than by granting this writ.”

The court unanimously ordered a mandamus to issue.

The celebrity of lord Mansfield’s speech in the house of lords in the Douglas cause, in the year 1769, made a strong impression on the minds of his hearers; and, considering the voluminous mass of evidence which had been brought forward, and engaged the attention of the House of Lords many days, the compression of that evidence and the conciseness of his lordship’s speech may be considered as some of its greatest ornaments.

Lord Mansfield. “I must own that this cause before us is the greatest and most important that occurs to me; it is no less than an attack upon the virtue and honor of a lady of the first quality, in order to dispossess a young man of an eminent fortune, reduce him to beggary, strip him of his birth-right, declare him an alien and a foundling. I have slept and waked upon the subject, considered it upon my pillow, to the losing of my natural rest, and, with all the judgement I was capable, have considered the various articles that make up this long and voluminous cause, upon which I am now to give my opinion before your lordships.

“I apprehend that, in the matter before us, three things are to be considered. The situation of lady Jane before her delivery, at her delivery, and after it was over; to all which the Chancellor (lord Camden) has spoken with great propriety. It is proved beyond a possibility of doubt, that she became pregnant in October 1747, at the age of forty-nine years, a
thing

thing far from being uncommon, as is attested by physicians of the first rank, and confirmed by daily experience; and that in the month of July she was delivered of twins, one of whom died, the other is still alive: he has been presented to the world, by sir John Steward and lady Jane Douglas, as their son; nor can he be wrested from the hands of his parents, unless some other had, in their lifetime, claimed him as their child in a legal and justifiable way.

“This action, my lords, did not lie against the appellant as an impostor; for, an impostor, in the sense of the law, is a person who wilfully and knowingly pretends to be a different one from what he really is, in order to defraud another, and to impose, under a fictitious name, upon the public. If any be an impostor, it must have been lady Jane, whom they ought to have prosecuted in her lifetime, and not at a distance of nine years after her death. The method of discovering an impostor is to bring his accomplice to the court before which the impostor was arraigned; and if, after a fair trial, the accused person be found guilty, let him take the consequences thereof; but this the respondents have neglected. The appellant has been, for five years, four months, and twelve days, the acknowledged son of lady Jane Douglas, and for thirteen years and two months the son of sir John Steward, before any attempt was made to rob him of his parents, his birth-right, and his all.

“As the lord chancellor has anticipated much of what I intended to speak upon this subject, so I shall only touch at the situation and character of the deceased, whom I remember in the year 1750 to have been in the most deplorable circumstances. She came to me, I being solicitor general, in a very destitute condition, and yet her modesty would not suffer her to complain. The noble woman was every way visible, even under the pressure of want and of poverty. Her visage and appearance were more powerful advocates than her voice; and yet I was afraid to offer her relief, for fear of being constructed to proffer her an indignity. In this manner she came twice to my house before I knew her real necessities, to relieve which now was my aim. I spoke to Mr. Pelham in her favor, told him of her situation with regard to her brother the duke of Douglas, and of her present straits and difficulties. Mr. Pelham without delay laid the matter before the king; the duke of Newcastle, then being at Hanover, was written to; he seconded the solicitation of his brother. His majesty immediately granted her three hundred

dred pounds *per annum* out of his privy purse, and Mr. Pelham was so generous as to order an hundred and fifty pounds of the money to be instantly paid. I can assure your lordships, that I never did trouble his majesty for any other. Lady Jane Douglas was the first and last who ever had a pension by my means. At that time I looked upon her to be a lady of the strictest honor and integrity, and to have the deepest sense of the grandeur of the family from whence she was sprung; a family, conspicuously great in Scotland for a thousand years past; a family, whose numerous branches have spread over Europe; they have frequently intermarried with the blood royal; and she herself was descended from Henry VII. I took care that his late majesty should be made acquainted with her family and name, to the intent that, though she was married to colonel Steward, a dissipated and licentious man, and who had been in the Rebellion in 1715, yet he would pass it over, as she was of a race who had always been eminently loyal, her brother having charged as a volunteer at the head of the cavalry in the year 1715, when his cousin the Earl of Forfar died like a hero in defence of the government; and that his grace had, in the year 1745, treated the rebels and their leader with contempt and ridicule; and indeed his majesty, from his wonted magnanimity, spoke nothing of her husband, but treated her with all respect due to a noble woman of the first rank and quality; one who carried all the appearance of a person habituated to devotion, and for a number of years trained up in the school of adversity and disappointment.

“Is it possible, my lords, to imagine that a woman of such a family, of such high honor, and who had a real sense of her own dignity, could be so base as to impose false children upon the world? Would she have owned them on every occasion? Was ever mother more affected for the death of a child than she was for that of Sholto, the younger of her sons? “Will you,” said she, “indulge me to speak of my son?” and cried out with great vehemency, “O Sholto! Sholto! my son Sholto!” And after speaking of his death, she said, “She thanked God that her son Archie was alive. What, said she, would the enemies of me and my children say, if they saw me lying in the dust of death, upon account of the death of my son Sholto? Would they have any stronger proof of their being my children than my dying for them?” She still insisted, that the shock she received by the death of Sholto, and other griefs she had met with, were so severe upon her, that

that she was perfectly persuaded she would never recover, but considered herself as a dying woman, and one who was soon to appear in the presence of Almighty God, and to whom she must answer. She declared, that the children Archie and Sholto were born of her body; and that there was one blessing of which her enemies could not deprive her, which was her innocence, and that she could pray to Almighty God for the life of her other son; and that she was not afraid for him, for that God Almighty would take care of him! And what is remarkable, the witness, Mary Macrabie, observed, that the grief for the loss of the child grew upon her. Would she, my lords, have blessed her surviving child on her death-bed? Would she have died with a lie in her mouth, and perjury in her right hand? Charity, that thinketh no evil, will not suffer me for a moment to harbour an opinion so cruel and preposterous; or can we suppose that two people, who had not wherewith to support themselves, would be solicitous, and shew all the tenderness of parents towards the children of creatures, who, forgetting the first principle of instinct and humanity, had sold their children to people whom they did not so much as know by their names? The act of Joseph's brethren, in selling him, is represented as wicked and unnatural; but indeed the crime of Madam Mignon and of Madam Sanry is still more black and atrocious! To carry this a little farther, suppose lady Jane Douglas had acted this out of a principle of revenge toward the family of Hamilton; yet Sir John Steward had no occasion to do so, much less continue the vindictive farce after her death, especially when married to another spouse. And here we may see Sir John as much a parent to the appellant as lady Jane; he was every way fond of him; it is in evidence: I know it to be true. My sister and I have frequently been at Mr. Murray's with them, and were always delighted with the care we observed. No mortal harboured any thoughts of their being false children at that time, I mean in 1750 and 1751. Every person looked upon them as the children of lady Jane Douglas and of colonel Steward. The countess of Eglington, lord Lindores, and many others, have, upon oath, declared the same thing.

“No sooner does the colonel hear of the aspersions raised at Douglas castle, and of Mr. Archibald Steward's swearing, that count Douglas, a French nobleman, had informed the duke of Douglas that they had been brought out of an hospital, than he returned an answer to Mr. Lock, who gave the intelligence in a letter to Mrs. Hewitt, and wrote to him in all the

terms of a man of spirit, cordially interested in the welfare and happiness of his son; but he and lady Jane begged the favor of chevalier Douglas a French gentleman and officer, then at London, to acquaint his cousin the count with what was said of him. This the chevalier undertook, and fulfilled with the fidelity of a man of honor; and the count, in consequence of the application, wrote a letter, not only to lady Jane, but to her brother the duke, in all the language of politeness and humanity disowning what was said of him.

“ But, my Lords, the duke of Douglas himself was fully satisfied of the appellant's being the real son of his sister lady Jane; for, on beginning to be known, after his marriage, and to relish the pleasures of social life, he became very inquisitive ‘ about the size, shape, and complexion, of the appellant, and if he appeared to be a smart boy.’ He employed Sir William Douglas and others in whom he could confide, to enquire of Mrs. Hewitt, lady Jane's companion, and of Euphemia Caw and Isabel Walker the two maid-servants who had lived with them when abroad, and observed their conduct in the most unguarded moments, concerning the birth of the children; he even searched into the characters of these; and it appears from the depositions of clergymen and gentlemen of the first rank in that country, that they were women worthy to be believed. He even went in person to visit Mrs. Hewitt, conversed with her in the presence of his gentleman, Mr. Greensheils, concerning his sister's delivery; and the accounts given by these, like the *radii* of a circle, all pointing to one and the same centre, confirming the reality of lady Jane being the mother of the young gentleman; he was satisfied, acknowledged him for his nephew, and left him his heir.

“ If the duke of Douglas, after so serious an enquiry, was convinced, why should not we? 'Tis true, his Grace has sometimes expressed himself warmly against the surname of Hamilton, even in lady Jane's life-time, but never so warmly as to prefer a supposititious child to the duke of that name; for he only declares, ‘ that, if he thought the children were lady Jane's, he would never settle his estate on the family of Hamilton;’ nor did he, till after detecting the frauds and conspiracies that had been so long and so industriously carried on against his sister and himself, make any alteration in his first settlement.

“ After

“After the duke’s death, the appellant was served heir to his uncle, according to the form prescribed by the law of Scotland, upon uncontroverted evidence of his being the son of lady Jane Douglas, takes possession of the estate, and is virtually acknowledged heir by the earl of Selkirk, and by the duke of Hamilton’s guardians themselves; for, these enter actions before the Court of Session, declaring their right to certain parts of the estates upon some antient claims which the judges there declared to be groundless; but in the whole action there was not the least intimation that Mr. Douglas was not the son of lady Jane.

“It is needless to trouble your lordship’s with the conduct of the Respondent’s guardians at Paris, and elsewhere upon the continent. Nothing has been discovered that could throw the least blemish upon the honour of lady Jane Douglas, or colonel Steward; they have, indeed, proved her straits there, and his imprisonment here; but both these circumstances carry a farther confirmation that the appellant is their son; for, in every letter that passed between them, the children are named with a tenderness scarce to be believed; whereas, had they been counterfeits, as pretended, they would have been apt to upbraid one another for an act so manifestly tending to involve them in their sufferings. Suppose, my Lords, that Mignon the glass-manufacturer’s wife, the pretended mother of Mr. Douglas, had deposed the same things in lady Jane’s presence, as she has so long after her death? From her evidence it appears, that she had never seen lady Jane; by her words, both in private and public, she seems to deserve no manner of credit; the oath of Mr. Murray, a principal witness, has destroyed every thing she has asserted. The same thing might be said of Sanry, the rope-dancer’s spouse, whose child’s rupture we were earnestly desired to keep in view, to prove him to be the identical Sholto, the younger of the twins; and now evidence is offered that the child Sholto had no rupture, but was as sound as any within these walls. Your Lordships have been told, and I believe with great truth, that a gentleman, shocked at the assertion, had written to the council, that the influence arising from so false a suggestion might be prevented. I alway rejoice to hear truth, which is the ornament of criticism, and the polished gem that decorates a bar.

“The scrutiny in France, followed by an action in Scotland, produced two things never intended by them: it brought forth a striking acknowledgement of the appellant, by his father John Steward, as is manifest from the bond of provision read at your lordships bar. Sir John openly acknow-
ledged

ledged him, before the Court of Session, in the midst of a crowded multitude, and when labouring under a load of anguish and pain; nay, when by himself, he solemnly declared before God, in the presence of a justice of the peace and two clergymen, that the young gentleman was his son. It likewise established the character of lady Jane; for, on examining the proof obtained through the vigilance of the dutchess of Douglas, lady Jane's reputation is unfulfilled and great; all who had the honor of being known to her declared, that her behaviour attracted universal esteem; and madam Marie Sophi Gillisen, a maiden lady with whom she lodged several months, deposes, 'that lady Jane was very amiable, and gentle as an angel.' It farther proved, that the elder child, the appellant, was the exact picture of the father; and the child Sholto as like lady Jane as ever a child was like its mother.

"I have always considered likeness as an argument of a child's being the son of a parent, and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike; and, in an army of an hundred thousand men, every one may be known from another. If there should be a likeness of features, there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness runs generally through all these; for in every thing there is a resemblance, as of features, size, attitude, and action; and here it is a question, whether the appellant most resembled his father Sir John, or the younger, Sholto, resembled his mother lady Jane? Many witnesses have sworn to Mr. Douglas being of the same form and make of body as his father; he has been known to be the son of colonel Steward, by persons who had never seen him before; and is so like his elder brother, the present Sir John Steward, that, except by their age, it would be hard to distinguish the one from the other.

"If Sir John Steward, the most artless of mankind, was actor in the *enlevement* of Mignon and Sanry's children, he did in a few days what the acutest genius could not accomplish for years. He found two children; the one the finished model of himself, and the other the exact picture in miniature of lady Jane. It seems nature had implanted in the children, what is not in the parents; for, it appears in proof, that in size, complexion, stature, attitude, colour of the hair and eyes, nay, and in every other thing, Mignon and his wife, Sanry and his spouse, were *toto cælo* different from, and unlike to,

to, Sir John Steward and lady Jane Douglas. Among eleven black rabbits there will scarce be found one to produce a white one.

“The Respondent’s cause has been well supported by the ingenuity of its managers, and great stress has been laid upon the not finding out the house where Madam La Brun lived, and where the delivery was effected; but this is no way striking, if we consider that houses are frequently pulled down to make way for streets, and houses are built upon the ground where streets run before: of this there are daily examples in this metropolis. However, we need enter into no arguments of this kind, as there is a positive evidence before us, nor is it possible to credit the witnesses, some of them of a sacred character, when they speak of lady Jane’s virtues, provided we can believe her to have been a woman of such abandoned principles as to make a mock of religion, a jest of the sacrament, a scoff of the most solemn oaths, and to rush, with a lie in her mouth, and perjury in her right-hand, into the presence of the Judge of all, who at once sees the whole heart of man, and from whose all-discerning eye no secrecy can screen, before whom neither craft nor artifice can avail, nor yet the ingenuity and wit of lawyers can lessen or exculpate. On all which accounts I am for finding the appellant to be the son of lady Jane Douglas.”

The earl of Chatham, on the 1st of May, 1770, presented to the House a bill “for reversing the adjudications of the House of Commons, whereby John Wilkes, Esq. has been adjudged incapable of being elected a member to serve in this present parliament, and the freeholders of the county of Middlesex have been deprived of one of their legal representatives.” This bill having been read the first time, and a motion made that it should be read a second time on Thursday then next—the earls of Temple and Chatham supported the motion; which called up Lord Mansfield.

“My Lords,

“In this debate, though it has been already spoken to with great eloquence and perspicuity, I cannot content myself with only giving a silent vote; I feel myself under a strong necessity of saying something more; the subject requires it, and, though the hour is late (it being then near ten o’clock), I shall demand your indulgence, while I offer my sentiments on this motion.

“What

“What part I took previously in this matter shall ever remain with myself. I have, I must confess, deposited it in the breast of one of the Royal family; but, resting secure in that confidence, I shall never declare it to any other.

“I am sure, my lords, many of you must remember, from your reading and experience, several persons expelled the House of Commons without ever this House once pretending to interfere, or call in question by what authority they did so. I remember several myself (here his lordship quoted several cases with great strength of memory); in all which, though most of the candidates were sure to be re-chosen, they never once applied, resting contented with the expulstatory power of the House, as the only self-sufficient dernier resort of application.

“It has been echoed on all sides, from the partizans of this motion, that the House of Commons acted illegally, in accepting colonel Luttrell, who had but 296 votes, in preference to Mr. Wilkes, who had 1143; but this is a mistake of the grossest nature imaginable, and which nothing but the intemperature of the people's zeal could possibly transport them to, as Mr. Wilkes had been previously considered by the laws as an unqualified person to represent the people in parliament; therefore it appears very plainly, that colonel Luttrell had a very great majority, not less than 296, Mr. Wilkes being considered as nobody in the eye of the law; consequently colonel Luttrell had no legal opposition.

“In all contested elections, where any of the parties think themselves not legally treated, I should be glad to know to whom it is they generally resort? Is it to the freeholders of the borough, or the county, they would represent, or is it to the people at large? Who cannot see at once the absurdity of such a question? Who so ignorant of our laws, that cannot immediately reply and say, ‘it is to the House of Commons, who are the only judges to determine every nicety of the laws of election, and from whom there is no appeal after they have once given their determination?’ All the freeholder has to do is to determine on his object by giving him his vote. The ultimate power lies with the House of Commons, who is to judge of his being a legal object of representation in the several branches of his qualifications. This, my lords, I believe is advancing no new doctrine, nor adding an iota to the extension of the privilege of a member of the House of Commons more than what the constitution has long ago given him. Yet here is a cry
made

made in a case that directly applies to what I have been speaking of, as if it was illegal, arbitrary, and unprecedented.

“ I don't remember, my lords, either in the course of my reading or observation, ever to have known an instance of a person being re-chosen, after being expelled, till the year 1711. Then, indeed, my memory serves me with a case of sir Robert Walpole; he was expelled the House of Commons, and was afterwards re-chosen; but this last event did not take place till the meeting of the next parliament; and, during that interval, I find no debate about the illegality of his expulsion, no interference of the House of Lords, nor no addresses from the public to decry that measure by a dissolution of parliament.

“ Indeed, as for a precedent of one house interfering with the rules, orders, or business of another, my memory does not serve me at present with the recollection of a single one. As to the case of Titus Oates, as mentioned by the noble lord in my eye, lord Chatham, he is very much mistaken in regard to the mode; his was a trial in the King's Bench, which, on a writ of error, the House of Commons interfered in, and they had an authority for so doing; a judge certainly may be mistaken in point of law, the wisest and the best of us may be so at times, and it reflects no discredit, on the contrary it does particular honor, when he finds himself so mistaken, to reverse his own decree; but for one house of parliament interfering with the business, and reversing the resolutions of another, it is not only unprecedented, but unconstitutional to the last degree.

“ But suppose, my lords, that this house coincided with this motion; suppose we all agreed *nem. con.* to repeal and rescind the resolutions of the House of Commons in regard to the expulsion and incapacitation of Mr. Wilkes; good God, what may be the consequence! The people are violent enough already; and to have the superior branch of legislation join them, would be giving such a public encouragement to their proceedings, that I almost tremble, while I even suppose such a scene of anarchy and confusion.

“ I remember, my lords, an anecdote of Roman History, as told us by that justly celebrated historian Livy. At a period when the people of Rome thought their senate were acting unconstitutionally, they had formed a scheme of giving them up into the hands of the enemy: determined on this opinion, they were for some time waiting but for an opportunity; when one of their leaders, on whose valour, wisdom, and integrity, they had the last de-

pendance, diverted them from their intentions, by reminding them, 'that by this revolution they might probably change for worse masters.' From the inference that may be drawn from this anecdote, and for the reasons I have already mentioned to your lordships, I am against this bill."

On the question whether the bill should be read a second time, the house divided. It was resolved in the negative. Bishop Newton, in writing his own Life and Anecdotes, has expatiated on, and considered the last speech, as one of the most brilliant and convincing which lord Mansfield ever delivered. Indeed he asserts, that the second reading was negatived without a division.

Having travelled over a large space of fertile legal ground in this second tour, or division of the work, it is more than probable that the generality of readers are, and that the young jurisperit particularly is, heartily disposed to pause a little.—

From the year 1756, when the honourable Mr. Murray was appointed chief justice, and created a peer of this realm, down to the period of time at which we are now arrived, it must be acknowledged that the elaborate arguments or speeches of lord Mansfield, in the course of twelve or thirteen years, stand unrivalled, appear formidable, not only *cum numero, sed pondere*. The real difficulty to be obviated now is, by way of question and answer. How was it possible that amongst the incessant hurry of business, wherein the lord chief justice was engaged, and immersed as it were, he should be able to find time to prepare those elaborate arguments? The answer will be best given in lord Mansfield's own words. When his lordship had prepared the *brouillon* of an argument, as he was pleased to call it, in the great cause of Taylor *versus* Horde, esq. *et alios*, in the year 1757, he gave this good-humoured account of it in a letter to one of his brothers on the bench: "*I am very impatient to discharge myself entirely of it. While the company is at cards, I play my RUB-*

BERS

BERS at this work, not the pleasantest in the world; but what must be done, I LOVE TO DO, and have it over."

Active, very active, as his mind generally was, yet, in the long vacation of 1758, his lordship became an advocate for idleness, saying, "*I am as idle as you can be; but I have a great many men at work, I advise you to repeat the dose. Liber esse mihi non videtur, qui non aliquando nihil agit.*"

At Lancaster Assizes in August, 1758, his lordship observed, in a letter to a friend in town, "*there was more business than ever known, the crown side almost as good to the bar as the other. I had an enormous gaol;*" yet the fatigue of this heavy gaol seems to have been forgotten, or lost sight of, in the next sentence. "*You will be angry when you hear it otherwise, if I should not tell you, that the grand jury, at Lancaster, did me the honor of a public compliment, read by Mr. Shuttleworth the foreman, and signed by all the rest. I have been very happy in my colleague, and need not say that he loves and honors you.*" Who that colleague was does not appear. The fact, if material, might easily be ascertained by reference to the Circuit Gazette of that year; but it seems to be more material to proceed to prove that, in this very year 1758, lord Mansfield, in writing to a friend on the loss of Mr. Justice Dennison, for whom he had the most sincere regard—his own heart-felt language on this occasion is, "*As an office of piety, I am prompted to write the inclosed. I am not used to writing, much less to writing epitaphs.*"

The curious reader would, in all probability, as soon have suspected that his lordship was *composing a sermon*, as that he was writing an *epitaph*, of which the following is a correct copy:

"To the Memory of
SIR THOMAS DENNISON, knight,
this monument was erected
by his afflicted widow.

He was an affectionate husband,
 a generous relation,
 a sincere friend, a good citizen,
 an honest man.

Skilled in all the learning of the common law,
 he raised himself to great eminence
 in his profession;
 and shewed by his practice
 that a thorough knowledge
 of legal art and form
 is not litigious, or an instrument of chicane,
 but the plainest, easiest, and shortest way
 to the end of strife.

For the sake of the publick,
 he was pressed, and at last prevailed upon,
 to accept the office of a Judge
 in the Court of King's Bench.

He discharged the important trust
 of that high office
 with unsuspected integrity
 and uncommon ability.

The clearness of his understanding,
 and the natural probity of his heart,
 led him immediately to Truth, Equity,
 and Justice.

The precision and extent of his legal knowledge
 enabled him always to find the right way
 of doing what was right.

A zealous friend to the constitution
 of his country,
 he steadily adhered to the fundamental principle
 upon which it is built,
 and by which alone it can be maintained;
 a religious application of the inflexible
 rule of Law
 to all questions concerning the power
 of the Crown,

and privileges of the Subject.

He resigned his office, February 14, 1765,
because from the decay of his health,
and loss of his sight,
he found himself unable any longer
to execute it.

He died September the 8th, 1765, without issue,
in the 67th year of his age.

He wished to be buried in his native country,
and in this church.

He lies here*,
near the lord chief justice GASCOIGNE,
who, by a resolute
and judicious exertion of his authority,
supported Law and Government in a manner
which has perpetuated his name,
and made him an example famous to posterity."

Nota. The real fact is, that to serve a living friend (Dr. Johnson, afterwards bishop of Gloucester) Lord Mansfield actually did compose a *political sermon* for the 30th of January, which will be resumed in its proper place. The wonder is therefore now less, that he should, in memory of a *deceased friend*, write an epitaph.

* In Harewood Church, Yorkshire.

WILLIAM KANE OF MASSACHUSETTS

and privileges of the subject.
He resigned his office, February 1st, 1854,
because from the loss of his health,
and loss of his sight,
he found himself unable any longer
to exercise it.
He died September the 30th, 1864, without issue,
in the 64th year of his age.
He wished to be buried in his native country,
and in this church.
His last home,
near the Lord's Church, Cambridge,
was, by a relative,
and judicious exertion of his authority,
supported law and Government in a manner
which has procured his name,
and made him an example to posterity.

Notes: The result is that to have a living friend (Mr. Johnson),
afterwards Bishop of Gloucester, and afterwards a
companion a special friend for the year of 1854, which will
be referred to in proper place. The result is therefore now
left, that he should, in memory of a friend, this an
epitaph.

to be buried in Church, Cambridge.



W. Grimaldi del. Miniature Painter to His R. H. the Duke of York.

Engraved by J. Jones Engraver Extraordinary to His R. H. the Prince of Wales & Principal Engraver to His R. H. the Duke of York.

William (late)



Earl of Mansfield

Virtutis vere Custos

Quo multae magnaeque secantur Iudice lites.

Hor.

CHAPTER THE THIRD.

QUAMVIS SIT CLARIS COLORIBUS, PICTA, VEL POESIS, VEL ORATIO.

CIC. DE ORAT.

CHAPTER THE THIRD.

QUARTER OF CLARK COLONIES, 1800, AND THE
THE CLARK

CHAPTER III.

THE Public have an indubitable right to be informed of every thing curious, even though not of real importance, relative to a distinguished character. Hence we feel it our duty to attempt a detail of the exertions made by many eminent artists to perpetuate the true resemblance of lord MANSFIELD, at distinct and interesting periods of his long life.

The first, in point of time, may naturally be supposed to be replete with vivacity and spirit, since it presents to the curious eye Mr. Murray, when a young barrister, in his maiden bargain, about the year 1734, and is allowed to be an animated likeness. The ingenious artist was J. Baptist Vanloo. This portrait is half-length, and is at this day in high preservation in the chambers of the Author of these sheets in *Lincoln's Inn*.

The next is a picture of great merit, at full length, from the spirited pencil of Martin, and is now in the possession of Doctor Turton, F. R. S. at his house in the Adelphi. Lord Mansfield recommended the situation, and expressed his desire to present himself to his friend and physician, in his robes of a peer attendant at the coronation. This invaluable portrait bears the following neat and classical inscription :

O o

“ OPTIME

“ OPTIME MÆCENAS, LAUDI GRATISSIME NOSTRÆ,
 QUIPPE, QUIBUS LAUDI EST TE MEMINISSE SUUM,
 CONSILIO ILLUSTREM, TE JACTAT CURIA, JACTANT
 TE SIBI PRÆSIDIUM, TE SIBI JURA DECUS.
 RESTAT ADHUC PER QUOD TUA GLORIA CLARIOR EXTET;
 IMMO, EA VIRTUTI QUÆ COMES INVIDIA.”

The fair occasion, which gave birth to this beautiful apostrophe, was this : When party-prejudice ran high, and Mr. Wilkes was at war with lord Mansfield, on account of the sentence of outlawry, &c. one of the Westminster youths made the rage of Mr. Wilkes his theme, or the subject of a Latin epigram. Under the auspices of the archbishop of York, then Dr. Markham, and head master of Westminster School, the epigram was made, and the pleasing effect of the animation of the speaker, when he stepped forward, respectfully bowed, and addressed himself to LORD MANSFIELD, who was present, is more easy to be conceived than expressed.

Another full length portrait of his lordship was likewise admirably executed by the same artist in the year 1776, and is now, in honor of Alma Mater, distinguishable at Christ Church, Oxford, of which, as is universally allowed, Mr. Murray was a shining ornament. His lordship is represented as sitting in a chair, and in a peer's coronation robes. The following characteristic insignia are worthy of notice. His right hand is on a volume of CICERO, and a bust of Homer is placed on the table.

The duke of Norfolk is possessed of another strong and expressive likeness of Mr. Murray, at full length, by Vanloo, with which our tyro at the bar presented his young friend and contemporary, Mr. Booth ; on whose death it was presented to the late Henry Howard, esquire.

Another, by Hudson, distinguishable not only for an animated likeness, but also for inimitable drapery, was painted for Mr. Hoskins of Lincoln's Inn, who was also contemporary with Mr.

Murray, and is now in the possession of Mr. Smith, an eminent solicitor in Chancery.

The next, in point of time, and, possibly, of merit, is in the possession of the family of the late Andrew Moffat, esquire, the friend and favorite of lord Mansfield, who with some ingenuity obtained it from the scientific and praise-worthy Caleb Whitefoord, esquire, another friend of his lordship.

Mr. Moffat, being possessed of a portrait of lady Mansfield, requested the loan of her companion through life, to see how well they would accord together, and ever afterwards, with great emphasis and good humour, told Mr. Whitefoord. "It would be a great pity, nay, unpardonable in you, to separate man and wife." This portrait is illustrated with the just and concise motto of

NIL ORTUM TALE.

Another full length portrait, and, in the estimation of lord Mansfield, the most pleasing picture, painted likewise by Martin, in the grave, yet elegant dress in which his lordship was presented to the late most unfortunate French king and queen at Versailles in the year 1774, viz. in a well-dressed tie-wig, a black velvet coat, and an handsome white embroidered waistcoat, is now in the possession of John Way, esquire, at his house at Acton in Middlesex.

The inimitable pencils of sir Joshua Reynolds and of Mr. Copley remain, to close the description of the valuable portraits of this exalted character. The city of London had expressed a strong desire to have lord MANSFIELD's picture in Guildhall, where he had appeared many thousand times with great dignity and advantage to the commercial interests of the first city in the world; yet whether his disinclination to be drawn at so late a period of life, or whether any real objection operated on his mind, he certainly did resist many importunities of his friends. He was, how-

ever, at last prevailed on, by the archbishop of York and lord Stormont, to sit before sir Joshua, to gratify the wishes of the city of London, as he had previously done, no less than four times to Copley, out of respect to Mr. Justice Buller. These portraits are at full length. Here we find venerable age depicted with great serenity, yet not devoid of spirit or dignity.

Some miniature pictures of his lordship are in existence, the most valuable of which is supposed to be that from which the engraving in the front of this chapter has been made, and where-with Dr. Combe has obligingly enriched the present publication.

Another excellent miniature is in the possession of George Brooks, of Green Street, Grosvenor Square, esquire, to whom it was bequeathed in nature of an heir-loom to go from father to son.

From Martin's chef-d'œuvre, in the possession of Mr. Way, and from the munificent cast of Sir James Marriott's mind, several miniature pictures were not only made by an ingenious young artist, but also a Bust of lord Mansfield was executed by Nollekens, which is allowed to be a very strong, expressive, and animated likeness of this exalted character, whose semblance is not confined to Oxford, but is extended to the sister university. Christ Church, Oxford, may be permitted to exhibit, and to triumph in the exhibition of one of its chief ornaments in the dignified situation of a peer in his coronation robes; yet *Trinity-Hall* in Cambridge has the merit of boasting that they are possessed of an invaluable proto-type, and that, in the effort to do honor to the exalted merit of a lord chief justice, they have reflected great honor on a judge, the present master of *Trinity-Hall*.

The lovers of poetry will be disposed to contend, that the most pleasing pictures of Mr. Murray, in his juvenile days, were successfully exhibited by his friend and favorite, Mr. Pope. A friendship

ship early formed on the basis of merit and mutual good offices, bids fair to flourish, and to diffuse its healing balm through life; accordingly Mr. Pope, in the decline of life, used to spend several of his winter evenings with lord Mansfield at his house in town, and, as his lordship used frequently to be out upon business, the poet, who had the entrance of his study, not unfrequently used to fill up his time in writing Latin epigrams, which, when he shewed to lord Mansfield, he generally discouraged, and sometimes used to throw them into the fire, exclaiming, "that the first English poet in the world, who had most embellished the English language, ought not to write any thing but in his own language."

On another occasion he observed, that, if Pope's fame was already sufficiently established, his friends and his country had yet claims upon him, and would not fail to set up those claims so long as he had a propensity to write.

To resume the consideration of judicial authorities, a faithful illustration of which will not fail to exhibit the most perfect picture of jurisprudence, more lasting than canvas, or marble itself. Whenever any serious doubt has arisen in a cause in Equity, concerning questions or points which are strictly legal, such questions or points have usually been referred to the consideration of a court of law. Thus intricate cases, upon the legal construction of wills, are generally sent out of the court of Chancery to the court of King's Bench, for the opinion of that court. In these instances, although it is unusual to assign the reasons for, or the grounds of, a certificate of a court of law, yet it seems to be of some importance to the public in general, who have real property to dispose of, to have clear proof adduced; that in the various cases sent by the court of Chancery to the court of King's Bench, during the thirty years in which lord Mansfield presided there, the *Polar Star*, which he steered by, and invariably kept in view, was the clear and manifest intention of the

the testator ; that his sedulous attention was confined to, and the exercise of his great powers were employed in effectuating that intention, so far as by the rules of law it might be preserved and carried into effect.

A few instances will, it is to be hoped, usefully illustrate this proposition, *viz.* that those testators, who endeavour to express their real intention with as much precision and clearness as they are able, have the fairest prospect of shutting out expensive litigation, or of rendering it in many instances unnecessary to evince or determine how far such intention can be effectuated : Or should such testators be so unfortunate, either on account of their not having had able assistance in the solemn act of settling their wills, or on account of some incongruity, inconsistency, or obscurity, which may have crept into, or appear on the face of, the will ; those relations, friends, or objects of their bounty, will have the satisfaction to find, that the labours of lord Mansfield, in the great field of contests upon wills, and in aid of the real *intention* of the testator, are not likely to be in vain, or to become obsolete, in succeeding ages.

The case of Robinson and Robinson is the first in point of time, a summary account whereof has been already given in Chap. II. of this work.

Another important case sent out of the court of Chancery, was that of J. Harris and Barnes, of which a summary statement is here given from the author's note-book.

“ *This* was a case sent from the Court of Chancery, upon the will of George Coningesby, D. D. who, being seised in fee of the manor of Grendon Warren, &c. in the county of Hereford, on the 15th of February, 1776. made his will, in which (*inter alia*) are these words : ‘ I give and devise my manor of Grendon Warren, in the county of Hereford, and my farm lands and premises called Grendon Warren, in the occupation of the said James Stone, and all my estate called Little Hegdon, *alias* Hegthorn, being within or near to Grendon Warren aforesaid ; also all other my freehold estates,
lands,

lands, and premises, lying and being at Grendon Warren aforesaid, or in any other parish or place within the said county of Hereford, unto my kinsman Coningesby Harris, of the parish of Claimes, in the county of Worcester, gentleman, for the term of ninety years, from my decease, if the said Coningesby Harris shall so long live : and *after the determination of that estate*, I give and devise all the said premises in the county of Hereford unto the *heirs of the body of the said Coningesby Harris*. And in default of such issue, I give and devise all my said estates and premises in the county of Hereford unto my cousin Mrs. Susan Elletson, for the term of ninety years, if the said Susan Elletson so long lives, and to commence from the decease of the said Coningesby Harris, he dying without issue : and, subject to the estates and contingencies before mentioned, I give and devise all my said estates in the county of Hereford unto Roger Elletson, esq. son of my said cousin Susan Elletson, for and during the term of his life ; and from and after his decease (subject to the devises aforesaid), I give all my said estates and premises in the county of Hereford unto the first and every other son and sons of the body of the said Roger Elletson, and to the heirs male of the body and bodies of every such son lawfully issuing, with several remainders over. And after directing all his debts, legacies, funeral expences, &c. to be paid out of his personal estate, he goes on, ‘ and after such payments, that my said trustees apply the residue and remainder of my said personal estate in purchasing lands, tenements, and hereditaments, in fee simple, lying in the county of Hereford, such lands, tenements, and premises, to be conveyed to, and vested in, the trustees named in his will, their heirs and assigns, in trust to and for, and upon the same uses, limitations, persons and purposes, that my said estates in Herefordshire are by me before given or devised, or stand limited by this my will, and consistent with the contingencies happening in the mean time : and for the trusts and purposes before mentioned, relating to my personal estate, I give and devise unto the said trustees (naming them), their heirs and assigns, all my freehold estate and title I have in any mortgage or mortgages in fee, and the fee and freehold, and all my right of and in all such mortgaged estates and premises.”

“ The said testator Dr. Coningesby died on or about the 15th day of May, 1766, without altering or revoking his said will (except that by a codicil, dated the 20th of February, 1766, he gave £. 80. to his servant *John Winkbridge*), without issue, leaving the defendant *Elizabeth Barnes* his only sister and heir at law.

“ The

“The executors duly proved the will, and took upon themselves the burthen of the execution thereof.

“The plaintiff Coningesby Harris, the first devisee in the said will named of the *Herefordshire* estates, soon after the death of the said testator, entered, and took possession thereof; but hath *no issue* of his body.

“Mrs. Susan Elletson, the next devisee of the said *Herefordshire* estates, survived the said testator, and is lately dead, leaving Roger Elletson her only son and heir at law.

“The said Roger Elletson, the next devisee of the said *Herefordshire* estates, is now living, but hath not any child.

“The moneys and securities for money, arrears of rent, and other personal estate, directed by the said will to be laid out in the purchase of lands, and settled to the same uses with the *Herefordshire* estate, is of a considerable amount, and is as yet unliquidated: but the same hath not as yet been laid out in a purchase, pursuant to the said will.

“The question therefore referred for the opinion of this court upon the above case and facts is, ‘whether the *heirs of the body of the plaintiff Coningesby Harris* take *any*, and *what estate*, under the said testator’s will.’

“Lord Mansfield, after the case had been elaborately argued by counsel on both sides, was pleased to say, ‘We’ll think of it, and give our certificate. We shall consider what the testator *meant*, and the *necessary construction* of his words.’

“And on Wednesday the 3d of February, 1768, his lordship communicated to Mr. *Blackstone* (publicly) the certificate which they had settled; *viz.*

“Having heard counsel on both sides, and considered this case, we are of opinion, that the clear manifest *intent* of the testator, was to give an estate tail to such person as should be heir of the body of *Coningesby Harris*, *at the death of the said Coningesby* (the only determination of the ninety years term in the testator’s view), *to him and the heirs of the body of the said Coningesby*; with remainders over, as in the will; which intent of the testator may, by law, take effect, as an *executory devise*; for, the contingency must happen within the compass of a life in being; and the freehold in the mean time (being undisposed of) descends to the testator’s heir at law.

“And this, his lordship said, would effectuate the whole intention of the testator.”

Subse-

Subsequent to the last case was that of Wellington and Wellington, upon a point of real consequence—Whether a testator who was a batchelor, and devised his estates, in default of issue of his own body, to two trustees, and their heirs, had effectually disposed of his estates by the will.

“ This was a case out of chancery, upon the will of Richard Cary, late of Walcottin, in the county of Oxford, esq. wherein, after directing the payment of his debts and funeral expences, he proceeds thus : ‘ *Item, in default of issue of my own body, I give, devise, and bequeath,*’ &c. and so gives all his estates in the several counties of Oxford, Southampton, Middlesex, Surrey, Hereford, and in the city of London, unto John Arrowsmith, of Chalbery, in the county of Oxford, Clerk, and to James Simmons, one of the aldermen of New Woodstock, in the county of Oxford, and their heirs, in trust, to pay out of the rents, issues, and profits, unto his sister Elizabeth Wellington an annuity of £. 100. *per annum*, during such time, and until all his just debts, funeral expences, and legacies (other than annuities) should be fully paid and satisfied ; and also an annuity of £. 40. *per annum* to a servant, Sarah Vollier. Then he gives another annuity, and several legacies ; and directs, that, *immediately from and after such time as all his just debts, funeral expences, and the legacies given by his will (other than annuities), shall be fully paid and satisfied by the said trustees, from and out of the rents and profits* of his said estates, and subject to the two annuities before given to the said Sarah Vollier and Jane Wellington, he gives and devises all his estate, to his sister Elizabeth Wellington for life, with divers remainders over.

“ The testator, at the time of making his said will, and at the time of his death, was seised *in fee* of the premises devised by him to the said John Arrowsmith and James Simmons, *in default* of issue of his own body ; and died a batchelor, leaving the said Elizabeth Wellington and Jane Collins, wife of Thomas Collins, his sisters and coheirs. His trustees accepted the trusts.

“ Upon these facts, it was ordered by a decree in Chancery, dated the 9th of November, 1767, in a cause between the said Richard Cary Wellington and others, plaintiffs, and Thomas Collins and the said Elizabeth Wellington and others, defendants ; that the following question be put, for the opinion of this court of King’s Bench ; *viz.*

P p

“ Whether

“ Whether the said *John Arrowsmith* and *James Simmons*, the trustees in the said will, took *any* and *what* estate under the said will.”

“ Mr. Blackstone, on behalf of the plaintiffs, argued, that they took a *base* fee, determinable upon the payment of the debts, legacies, and annuities.

“ The objection was, that this devise to them is an *executory devise*, and *too remote* to take effect by law: it is not to take place till after a *general* failure of issue.

“ Answer. The default of issue of his body is only a *condition precedent*. The testator was a bachelor. His will was to take no effect, if he married and had children. The words of it are, ‘in *default* of issue of my own body,’ I give, devise, and bequeath, &c. If he had married and had children, *that* would have amounted to a revocation of his will.

“ After the question had been fully argued by Mr. Blackstone and Mr. Dunning; Lord Mansfield said, ‘When a devise must take effect *at* the death of the testator, it is not properly an *executory* devise. Such a devise is a devise upon a contingent event, which must happen at or before the death of the testator: an *executory* devise, is a devise that is to take place *in future*.

“ As to an *implied* revocation, from alteration of circumstances, it is now settled, ‘that as to *personal* estates, marriage, and having a child, is a revocation:’ But no case has yet holden that marriage *alone* is a revocation.

“ I see no ground of argument, why the law should not be the same as to devises of land. The *reason* is the same. In *Meggot versus Meggot*, lord *Hardwicke* directed an issue merely to try this question. But the cause was made up by the family, and never tried*.

“ We will think upon it; and give our certificate.

“ The certificate was as follows: ‘Having heard counsel on both sides, and considered this case, we are of opinion, that John Arrowsmith and James Simmons took a fee *determinable* when the purpose of paying the testator’s

* It has since been adjudged, in the Court of Exchequer, by the opinions of Sir Thomas Parker (then lord chief baron), Mr. baron Smythe, and Mr. baron Adams, against Mr. baron Perrot; and also at the Cockpit, Sir Eardley Wilmot and lord chief justice De Grey concurring, ‘that marriage and a child was a revocation of a devise of *land*.’

debts, legacies, and funeral expences, out of the rents, issues, and profits, of the devised premises, in aid of the personal estate, shall be *performed*.*

A cause of great importance upon the construction of a will, how far the manifest intention of the testator should prevail in letting in a devise in favor of children born subsequent to the execution of the will, on the ground of their being virtually included in the provision for a posthumous child, came on to be heard before the right honourable the Lord Chancellor, on the 7th of June, 1769, when a case was made for the opinion of the Court of King's Bench. The jurisperit will find a full state of the case * in 5th Burr. 2703. The following brief state of it will probably be sufficient to make the certificate of lord Mansfield, and the other judges of the court, perspicuous and satisfactory.

“ Edward Presgrave, being seised and possessed of a very considerable real and personal estate, did, on or about the 20th of October, 1753, duly make his will in writing, and thereby gave and devised to Eleanor his wife the several freehold and copyhold premises therein particularly mentioned (which said copyhold premises he had previously surrendered to the use of his will), to hold the same unto the said Eleanor until his son Thomas Presgrave should attain the age of twenty-one years; in trust, nevertheless, that she should educate and maintain him till that time, out of the rents and profits of the said premises; and then he devised the same to his said son Thomas in fee. But if it should happen that his said wife should be *enceinte* with one or more children, at the time of his decease, and his said son Thomas should die without issue before he attained the age of twenty-one years, such child or children being then living; he then devised the said premises to his said wife till such child or children should attain his, her, or their ages of twenty-one years; in trust nevertheless, that she should educate and maintain such child or children till that time, out of the rents and profits of the said premises; and then he devised the same to such child or children in fee. But if it happened that his said son Thomas should die without leaving issue of his body, and before he attained the age of twenty-one years, or that his

* White against Barber.

saïd wife should, at the time of his the saïd testator's decease be *enceinte* with one or more child or children, who should die without leaving issue of his, her, or their body or bodies, before he, she, or they, attained their age or ages of twenty-one years, then he devised the saïd premises to his saïd wife for the term of her natural life, with divers remainders over.

“ The testator, at the time of making his saïd will, had only one child, the saïd *Thomas*; but after the making thereof, and before his death, he had two other sons born; *viz.* the plaintiffs *Edward* and *John*.

“ On the 12th of January, 1759, the saïd testator *Edward Presgrave* died, without altering or revoking his will, leaving issue three children; the saïd *Thomas Presgrave* who died, without issue, in August, 1766, and the saïd *Edward Presgrave* and *John Presgrave*, infants of tender years, who were born after the making of the will, in the testator's life-time, and who are still living, and who are not provided for, unless they take by this will.

“ Eleanor the testator's widow was still living; but was not *enceinte* at the testator's death.

“ The case for the opinion of the Court of King's Bench was, ‘ Whether in the event that has happened, any and what estate is vested in the plaintiff Eleanor, and the several defendants the devisees, or any of them, and if no estate is vested in them, or any of them, then whether any and what estate is vested in the plaintiffs *Edward* and *John Presgrave*, the two infant children, or either of them?’ ”

“ After the case had been twice very ably and fully argued, the judges of the Court of King's Bench certified as follows:

“ *We are of opinion*, that, the provision made by the testator being for children which were to be born after the making of his will, he certainly *intended* to comprehend *all* the children which should be born of his then wife (whether *before* or *after* his decease); for, we think that a father, in making an express provision for any children which his wife should be *enceinte* with at the time of his *decease*, could never intend to give his estate to *such children*, in *exclusion* of, or to his *nephews* (as the event has happened) in *preference* to, any child or children that might be *born in his life-time*.

“ We are of opinion, therefore, that (notwithstanding the *defect of expression* in this will) the children *born before* the testator's death are *virtually included* in the provision so anxiously made by a parent for his posthumous children; and that, upon the true construction of this will, the plaintiffs

Edward

Edward and John will be intitled (from the testator's *manifest intent*) to take an estate in *fee* in the premises at their respective ages of one and twenty; and that in the mean time the plaintiff *Eleanor*, their mother, is entitled to hold the said premises, subject to the trust of the said will, for their education and maintenance.

April 23, 1771.

MANSFIELD.

R. ASTON.

E. WILLES.

W. H. ASHHURST."

Lord Mansfield's alteration of the mode of certifying cases sent from the court of Chancery to the court wherein he presided.—His lordship thus delivered the opinion of the court, with his observations on, and objections to, the former mode of certifying:

"I found it a custom, in cases sent by the court of Chancery for our opinion, to certify it privately to the lord chancellor in writing, without declaring in this court, either the opinion itself, or the reasons upon which it is grounded. But I think the custom wrong, as well as unsatisfactory to the bar; and therefore, in the two cases that now wait our certificate, and for the future, we shall declare our opinion in this court. The present case of *Wright and Holford* is that of a devise to the use of all and every the daughter and daughters of *Peter Holford* and *Constantia Maria Holford*, and the heirs of their body and bodies; such daughters, if more than one, to take as tenants in common, and not as joint-tenants; and, for *default of such issue*, to the use of the testator's right heirs. Our certificate in the present case is in these words.

"There are no words in the instrument bearing date the 3d of May, 1758, which intimate any intention to limit over the respective shares of the two daughters dying without heirs of their bodies respectively; on the contrary, the limitation over is of the whole estate limited to all the daughters, and is to take place on the express contingency of failure of all and every the daughter and daughters, and the heirs of their body and bodies; and the limitation over, in default of such issue, is to the heir at law. Consequently

we are of opinion, that as nothing is given to the heir at law whilst any of the daughters or their issue continue, they must among themselves take cross remainders."

N. B. Lord Mansfield added, "That the introductory words of 'there being nothing in the instrument of May 3, 1758', that shewed the limitation over to the right heir, was to take place upon failure of either of the daughters or their issue respectively, were emphatically put in, in answer to the cases of *Comber versus Hill*, and *Williams versus Brown*, cited in the argument by serjeant Hill, and in order to satisfy his doubts.

The case of Baldwin against Karver and another † was next in point of time, and was that of a devise to trustees, in trust for the use of the heirs male of J. A. and in default of such issue to the use of the heirs male of R. A. and, in default of such issue male, to the use of all and every the grandchildren of J. A. and S. M. as tenants in common.

By a codicil bearing even date with the will, the testator directs the trustees to pay the interest and produce of his real and personal estate to his wife S. A. and to the said J. A. and R. A. during their lives, with survivorship. Eight grandchildren were alive at the date of the will; a ninth was born before the testator died; twelve more were born after his decease, and all in the lifetime of R. A. who died without issue. Held, that as the twenty-one grandchildren, were all alive at the death of R. A. all were equally intitled. This case, *propter difficultatem*, was twice argued. Lord Mansfield delivered the opinion of the court at considerable length, which the jurisperit will find in Cowp. Rep. 313.

Soon afterwards the case of Freeman against the duke of Chandos and others, *et e contra*, introduced a question respecting a remote reversion in fee, which was deemed to pass under

* See Cowp. Rep. p. 34.

† Ibid. p. 309.

general words, in an act of parliament by way of settlement in execution of articles, though the reversion was not particularly in contemplation at that time *, the general words being sufficient to carry it, and the intention of the parties being to include all the estate of the settler.

In another branch of the last case, the material facts were stated to be ; One devises all his estate, &c. in the counties of Gloucester and Worcester, and elsewhere in the kingdom of England, to trustees, subject to certain charges thereon, and limitations in his marriage-settlement named, in trust to stand seised of the said estates in G. and W. or elsewhere to certain uses. His estates in G. and W. were the only estates charged or mentioned in his marriage-settlement. But he was also intitled to a reversion of certain estates in the counties of Oxford and Wilts. Held, that this reversion passed by the words "elsewhere in the kingdom of England † ; Lord Mansfield observing, that if the words of the will are not sufficient to carry the premises in question, the drag-net of conveyances will never end ; afterwards, on the 20th of November, in this term, the court certified in these words.

"Having heard counsel on both sides, and considered this case, we are of opinion that the reversion in fee of one undivided seventh part of the Keth estate, vested in Robert Tracy, did pass by the will of Robert Tracy."

In 1780, a farther case was sent from the court of Chancery, which was that of a devise of the fee-simple and inheritance to A. and his child or children for ever, when he shall be twenty-one years of age ; but, if he die before that time, then the fee-simple and inheritance to B, A. takes an estate-tail.

Lord *Mansfield*.—"I had a mind to see whether ingenuity could raise a doubt on the one side, or supply an argument on the other, to make the

* Cowp. Rep. p. 363.

† Ibid. p. 365.

case plainer than it is on the face of it. If the testator had used the words 'all his estate,' 'inheritance,' or 'for ever,' and had stopped there, the fee-simple would have passed. But the words, 'child or children,' are to the full as restrictive, as if he had said, 'and if my son die without heirs of his body.' To give the father an estate in fee, would be to strike those words out of the will. They must operate to give him an estate-tail, for there were no children born at the time, to take an immediate estate by purchase. The meaning is the same as if the expression had been 'to William and his heirs,' that is to say, 'his children or his issue. The words 'for ever,' make no difference, for William's issue might last for ever."

The Certificate was as follows :

"Having heard counsel and considered this case, we are of opinion, that William Stevens took (under the above will of Christopher Stevens) an estate-tail to him, and the heirs of his body, with reversion to himself in fee by descent."

12th February, 1780.

MANSFIELD.

E. WILLES.

W. H. ASHHURST.

F. BULLER.

Although the selection of a few leading cases sent by the Court of Chancery to a court of law may be sufficient to establish the proposition, which the author of these sheets was desirous to propound, respecting the declared intention of a testator being, as it were the polar star, which guided the lord chief justice and the court in their certificates ; yet, for the farther illustration of this doctrine, the jurisperit is referred to many similar and important determinations, in the opinions of lord Mansfield and the other judges of the court of King's Bench thereon, in 5 Burr. 2606. In Cowper's Reports, pages 40, 234, 360, 363, 797, 808. In Douglas's Reports ; see pages 470—491. Fonnereau and Fonnereau, which, *propter difficultatem*, was repeatedly and elaborately argued, and which affords another pleasing instance of lord Mansfield's stopping the judgement of the court from being entered-up ; and
altering

altering his opinion in consequence of further and full investigation of the abstruse doctrine of double contingencies and executory devises, whence the jurispudent may store his mind with rules and principles, well-worthy of being treasured up. *Id.* Liber. 309 and 415.

The substance of the Lord Chief Justice's charge to the Jury in Lord Sandwich's prosecution of the printer of the London Evening Post, for *Scandalum magnatum*.

Lord Mansfield said on this occasion,

“ There were two sorts of prosecutions in matters of libel, *criminal* and *civil*.—In cases of *criminal* prosecution, the truth or falsehood of the charge was totally immaterial, the charge itself being the libel. If a person charges another with felony, forgery, or theft, supposing the charge *true* in every part, the person is still guilty of a libel; and why? because the law has provided a punishment for such offences. If therefore the man is guilty, prosecute him; but to charge him with crimes is an *extrajudicial* proceedings, and as such may be punished. As to *civil* actions in cases of libel, the matter is otherwise; there the falsehood of the libel constitutes the crime. In the case before us, the defendant hath put himself upon proving the truth of the libel. Well! what have the evidence proved? Nothing which affects the plaintiff. Had Corte been Lord Sandwich's agent or secretary, the plaintiff might have been affected by a kind of implication; but, that not being the case, and the evidences both concurring to clear Lord Sandwich from having any hand in the business, not the slightest ground appears to accuse the plaintiff. Parrott was very properly asked the name of the person who procured these places: he at first boggled a little, but afterwards mentioned the person. With respect to the whole of the evidence, had the plaintiff's counsel objected to it, such objection would have been well founded; for undoubtedly it is not evidence *de bene esse*; it goes no farther than to prove a conversation which passed between the parties who delivered it and a third person; however, the counsel did not at first object to it, though they did afterwards. With respect to the publication, that is proved by the witness who bought the paper; and from the returns made by the Stamp-office it appears that the defendant was the publisher at the time the libel appeared. You will, therefore, Gentlemen, find for the

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plaintiff;

plaintiff; but I will not say one word about the *damages*, as you are perfect masters of the case, and will, no doubt, maturely weigh every circumstance of private and public character."

On the 9th of January, 1770, the king having opened the sessions with a speech, the duke of Ancaster made the usual motion for an address. Lord Chatham rose, and at the close of his speech took occasion to inform the house that he had drawn up an amendment to the address, which he begged leave to submit to the consideration of the house.

"And, for these great and essential purposes, we will, with all convenient speed, take into our most serious consideration the causes of the discontents which prevail in so many parts of your Majesty's dominions; and particularly the late proceedings of the House of Commons, touching the incapacity of John Wilkes, Esquire, (expelled by that House,) to be elected a member to serve in this present parliament; thereby refusing (by a resolution of one branch of the legislature only) to the subject his common right, and depriving the electors of Middlesex of their free choice of a representative.

"The cautious and guarded terms in which this amendment is drawn up, will, I hope, reconcile every noble lord who hears me, to my opinion; and, as I think no man can dispute the truth of the facts, so I am persuaded no man can dispute the propriety and necessity of laying those facts before his Majesty."

Lord Mansfield followed Lord Chatham.

"He began with affirming, that he had never delivered any opinion upon the legality of the proceedings of the House of Commons on the Middlesex election, nor should he now, notwithstanding any thing that might be expected from him. That he had locked it up in his own breast, and it should die with him: that he wished to avoid speaking on the subject; but that the motion made by the noble lord was of a nature too extraordinary, and too alarming, to suffer him to be silent. He acknowledged the unhappy distracted state of the nation; but he was happy enough to affirm, with a safe conscience, that he had no ways contributed to it: that, in his own opinion, declarations of the law made by either house of parliament were always attended

tended with bad effects ; he had constantly opposed them whenever he had an opportunity, and in his judicial capacity thought himself bound never to pay the least regard to them. That although thoroughly convinced of the illegality of general warrants (which, indeed, naming no persons, were no warrants at all), he was sorry to see the House of Commons by their vote declare them to be illegal. That it looked like a legislative act, which yet had no force or effect as a law : for, supposing the house had declared them to be legal, the courts in Westminster would, nevertheless, have been bound to declare the contrary ; and consequently to throw a disrespect upon the vote of the house : but he made a wide distinction between the general declarations of law, and the particular decision which might be made by either house, in their judicial capacity, upon a case coming regularly before them, and properly the subject of their jurisdiction. That here they did not act as legislators, pronouncing abstractly and generally what the law was, and for the direction of others ; but as judges, drawing the law from the several sources from which it ought to be drawn, for their own guidance in deciding the particular question before them, and applying it strictly to the decision of that question. That for his own part, wherever the statute-law was silent, he knew not where to look for the law of parliament, or for a definition of the privileges of either house, except in the proceedings and decisions of each house respectively. That he knew of no parliamentary code to judge of questions depending upon the judicial authority of parliament, but the practice of each house, moderated or extended according to the wisdom of the house, and accommodated to the cases before them. That a question touching the seat of a member in the lower house could only be determined by that house : there was no other court where it could be tried, nor to which there could be an appeal from their decision. That wherever a court of justice is supreme, and their sentence final (which he apprehended no man would dispute was the case of the House of Commons in matters touching elections) the determination of that court must be received and submitted to as the law of the land ; for, if there be no appeal from a judicial sentence, where shall that sentence be questioned, or how can it be reversed ? He admitted that judges might be corrupt, and their sentences erroneous ; but these were cases for which, in respect to supreme courts, the constitution had provided no remedy. That, if they wilfully determine wrong, it was iniquitous indeed, and in the highest degree detestable. But it was a crime of which no human tribunal could take cognizance, and it lay be-

tween God and their consciences. That he avoided entering into the merits of the late decision of the House of Commons, because it was a subject, he was convinced, the lords had no right to enquire into or to discuss. That the amendment proposed by the noble lord threatened the most pernicious consequences to the nation, as it manifestly violated every form and law of parliament; was a gross attack upon the privileges of the House of Commons, and, instead of promoting that harmony which the king had recommended, must inevitably throw the whole country into a flame. That there never was an instance of the lords enquiring into the proceedings of the House of Commons with respect to their own members; much less of their taking upon them to censure such proceedings, or of their advising the crown to take notice of them. If, indeed, it be the noble lord's design to quarrel with the House of Commons, I confess it will have that effect, and immediately. The lower house will undoubtedly assert their privileges, and give you vote for vote. I leave it, therefore, to your lordship's to consider the fatal effects which may arise in such a conjuncture as the present, either from an open breach between the two houses of parliament, or between the king and the House of Commons. But, my lords, if I could suppose it were even adviseable to promote a disagreement between the two houses, I would still recommend it to you to take care to be in the right; whenever I am forced into a quarrel, I will always endeavour to have justice on my side. Now, my lords, admitting the House of Commons to have done wrong, will it mend the matter for your lordships to do ten times worse?—And that I am clearly convinced would be the case, if your lordships were obliged to declare any opinion of your own, or offer any advice to the crown, on a matter in which, by the constitution of this country, you have no right whatever to interfere. I will go farther, my lords; I will affirm, that such a step would be as ineffectual as it would be irregular. Suppose the king, in consequence of our advice, should dissolve the parliament (for that, I presume, is the true object of the noble lord's amendment); the next House of Commons that meets, if they know any thing of their own privileges, or the laws of this country, will undoubtedly, on the very first day of the session, take notice of our proceedings, and declare them to be a violation of the rights of the Commons. They must do so, my lords, or they will shamefully betray their constituents and themselves. A noble lord (lord Marchmont) near me has proposed, that we should demand a conference with the other house. It would be a more moderate step, I confess,

but

but equally ineffectual. The Commons would never submit to discuss their own privileges with the Lords. They would not come to a conference upon such a subject; or if they did come, they would soon break it up with indignation. If, then, the Commons have done wrong, I know of no remedy, but either, that the same power should undo the mischief they had done, or that the case should be provided for by an act of the legislature. That, indeed, might be effectual. But whether such a remedy be proper or necessary in the present case, or whether indeed it be attainable, considering that the other house must give their consent to it, is not a question now before us. If such a bill should be proposed, it will be regular and parliamentary, and we may then, with propriety, enter into the legal merits of the decision of the House of Commons. As for the amendment proposed by the noble lord, I object to it as irregular and unparliamentary. I am persuaded, that it will be attended with very pernicious consequences to this country, and that it cannot possibly produce a single good one."

Lord Chatham's amendment was negatived.

On a further motion of Lord *Chatham**,

"That the capacity to be chosen a representative of the Commons in parliament being under known restrictions and limitations of law, an original inherent right of the subject may be cognizable by law, and is a matter wherein the jurisdiction of the House of Commons, though unappealable as to the seat of their member, is not final or conclusive."

His lordship's first speech, which lasted two hours, was extremely dispassionate, sensible, and much to the point in question. He enlarged greatly upon the Middlesex election, and urged the necessity of dissolving the parliament, which, he declared, by seating colonel Luttrell, and rendering Mr. Wilkes incapable of being elected, had infringed the rights of the electors, and that an action at law would certainly lie against the House. After displaying great eloquence, with the most admirable candor and gentleness, he made a digression upon the modern manner of

* 28 Nov. 1770.

directing a jury from the bench, and giving judgement upon prosecutions for libels.

Lord *Mansfield* rose, saying,

“ He should not speak to the question, but to what the noble lord had said in the digression, which, he observed, he had handled with great decency, that as to directions to juries, they had ever been the same as now; they were nothing novel, nor had they till this moment been once called in question. His lordship could, he said, quote numerous authorities, equally just and respectable, of this opinion; but he would now only mention three, Mr. Justice Dennison, Mr. Justice Foster, and Mr. Justice Yates, all independent men. The noble lord who spoke before had misconceived the matter, by implicitly believing, as many others did, what had appeared in print respecting the nature of libels and directions to juries, whereas much was often printed totally false and groundless. If he properly understood the noble lord, he meant to say, that the jury were told, they were only judges of fact, and not of law; but his lordship was mistaken; he had always, in one uniform manner, told a jury that they were to judge of what appeared by the evidence in court, both respecting the publication and respecting the justification of any libel. Where no justification of the matter in the information was entered into, they were to find, according to their judgement, whether the inuendos and the criminal inference* in the information were such as the paper deserved. His lordship observed, he should at all times be proud of changing his opinion, when it appeared to him that his judgement was improper. Many precedents of the ablest lawyers doing so might be recollected; and upon all trials where he presided, he told the court, if he was wrong in his direction, he would most willingly be set right; which might be done in an arrest of judgement; for, if a direction to a jury was improper, the whole verdict was null and void, and a new trial must be

* In all the late trials of the celebrated paper of Junius, his lordship never said a word to the jury that they were to judge of the criminal inference of the paper; but, on the contrary, constantly told the jury, “ That, whether the paper was criminal or not, was not a point for them, but for the court to determine.”

granted

granted. His lordship said, that, what might probably surprize that House, no objection had, in fourteen years, been ever made to his conduct in this particular, though he had so repeatedly desired the court to do it if they thought him wrong. Judges cannot go away from the express and known law of the land; they are bound by oath punctually to follow the laws. He declared, he had ever made it the rule of his conduct to do the thing that was just; and, conscious of his own innocence and rectitude, he was perfectly unmoved by any libel or publication concerning him. His lordship here also expressed the opinion he held of his own conduct and intentions by quoting a line from Shakspeare. As to the motion, and what the noble earl had thrown out respecting the dissolution of the House of Commons, their own House were last year alarmed at it; how much more should they now be, in the present situation of affairs? As to action for damages, what damage could be recovered of the House of Commons, who would, doubtless, plead a breach of privilege?"

He concluded with a great compliment to the earl of Chatham, for what he had, though out of office, very recently said in the House concerning the legality of the press-warrants.

1770.

On the 8th of May, 1770, a bill for taking away all privilege from a lord's effects, and from his servants, was debated in the Upper House; wherein justice being weighed by their lordships in the balance, preponderated over self-interest. Lord Mansfield rose in support of the bill,

"My lords,

"When I consider the importance of this* bill to your lordships, I am not surprized it has taken so much of your consideration. It is a bill, indeed, of no common magnitude; it is no less than to take away from two-thirds of the legislative body of this great kingdom certain privileges and immunities, of which they have been long possessed. Per-

* The bill passed, and the act received the royal assent at the end of the session.

haps there is no situation that the human mind can be placed in, that is so difficult, and so trying, as where it is made a judge in its own cause. There is something implanted in the breast of man so attached to itself, so tenacious of privileges once obtained, that, in such a situation, either to discuss with impartiality, or decide with justice, has ever been held as the summit of all human virtue. The bill now in question puts your lordships in this very predicament; and I doubt not but the wisdom of your decision will convince the world, that, where self-interest and justice are in opposite scales, the latter will ever preponderate with your lordships.

“Privileges have been granted to legislators in all ages and in all countries. The practice is founded in wisdom; and, indeed, it is peculiarly essential to the constitution of this country, that the members of both Houses should be free in their persons in cases of civil suits; for, there may come a time when the safety and welfare of this whole empire may depend upon their attendance in parliament. God forbid that I should advise any measure that would in future endanger the state; but the bill before your lordships has, I am confident, no such tendency, for it expressly secures the persons of members of either House in all civil suits. This being the case, I confess, when I see many noble lords, for whose judgement I have the greatest respect, standing up to oppose a bill which is calculated merely to facilitate the recovery of just and legal debts, I am astonished and amazed. They, I doubt not, oppose the bill upon public principles; I would not wish to insinuate that private interest has the least weight in their determination.

“This bill has been frequently proposed, and as frequently miscarried; but it was always lost in the Lower House. Little did I think, when it had passed the Commons, that it possibly could have met with such opposition here. Shall it be said that you, my lords, the grand council of the nation, the highest judicial and legislative body of the realm, endeavour to evade by privilege, those very laws which you enforce on your fellow-subjects? Forbid it justice. I am sure, were the noble lords as well acquainted as I am with but half the difficulties and delays that are every day occasioned in the courts of justice, under pretence of privilege, they would not, nay, they could not, oppose this bill.

“I have waited with patience to hear what arguments might be urged against the bill, but I have waited in vain; the truth is, there is no argument.

ment that can weigh against it. The justice, and expediency, of this bill is such as renders it self-evident. It is a proposition of that nature that can neither be weakened by argument, nor entangled with sophistry. Much, indeed, has been said by some noble lords on the wisdom of our ancestors, and how differently they thought from us. They not only decreed, that privilege should prevent all civil suits from proceeding during the sitting of parliament, but likewise granted protection to the very servants of members. I shall say nothing on the wisdom of our ancestors; it might perhaps appear invidious, and is not necessary in the present case. I shall only say, that the noble lords that flatter themselves with the weight of that reflection, should remember, that, as circumstances alter, things themselves should alter. Formerly it was not so fashionable either for masters or servants to run in debt as it is at present; nor formerly were merchants nor manufacturers members of parliament, as at present. The case now is very different. Both merchants and manufacturers are, with great propriety, elected members of the Lower House. Commerce having thus got into the legislative body of the kingdom, privilege must be done away. We all know that the very soul and essence of trade are regular payments; and sad experience teaches us, that there are men, who will not make their regular payments without the compulsive power of the laws. The law then ought to be equally open to all; any exemption to particular men, or particular ranks of men, is, in a free and commercial country, a solecism of the grossest nature. But I will not trouble your lordships with arguments for that which is sufficiently evident without any. I shall only say a few words to some noble lords, who foresee much inconveniency from the persons of their servants being liable to be arrested. One noble lord observes, that the coachman of a peer may be arrested while he is driving his master to the house, and consequently he will not be able to attend his duty in parliament. If this was actually to happen, there are so many methods by which the member might still get to the house, I can hardly think the noble lord to be serious in his objection. Another noble lord said, that by this bill one might lose their most valuable and honest servants. This I hold to be a contradiction in terms; for he neither can be a valuable servant, nor an honest man, who gets into debt, which he neither is able nor willing to pay till compelled by law. If my servant, by unforeseen accidents, has got in debt, and I still wish to retain him, I certainly would pay the debt. But upon no principle of liberal legislation

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whatever, can my servant have a title to set his creditors at defiance ; while, for forty shillings only, the honest tradesman may be torn from his family and locked up in gaol. It is monstrous injustice ! I flatter myself, however, the determination of this day will entirely put an end to all such partial proceedings for the future, by passing into a law the bill now under your lordships' consideration.

“ I now come to speak upon what, indeed, I would have gladly avoided, had I not been particularly pointed at for the part I have taken in this bill. It has been said by a noble lord on my left hand, that I likewise am running the race of popularity. If the noble lord means, by popularity, that applause bestowed by after-ages on good and virtuous actions, I have long been struggling in that race, to what purpose all-trying time can alone determine ; but, if the noble lord means that mushroom popularity which is raised without merit, and lost without a crime, he is much mistaken in his opinion. I defy the noble lord to point out a single action in my life where the popularity of the times ever had the smallest influence on my determinations. I thank God I have a more permanent and steady rule for my conduct—the dictates of my own breast. Those that have foregone that pleasing adviser, and given up their mind to be the slave of every popular impulse, I sincerely pity ; I pity them still more, if their vanity leads them to mistake the shouts of a mob for the trumpet of their fame. Experience might inform them that many, who have been saluted with the huzzas of a crowd one day, have received their execrations the next : and many who, by the popularity of their times, have been held up as spotless patriots, have nevertheless appeared upon the historian's page, when truth has triumphed over delusion, the assassins of liberty. Why, then, the noble lord can think I am ambitious of present popularity, that echo of folly and shadow of renown, I am at a loss to determine. Besides, I do not know that the bill now before your lordships will be popular ; it depends much upon the caprice of the day. It may not be popular to compel people to pay their debts ; and in that case the present must be an unpopular bill. It may not be popular neither to take away any of the privileges of parliament ; for I very well remember, and many of your lordships may remember, that not long ago the popular cry was for the extension of privilege ; and so far did they carry it at that time, that it was said that privilege protected members from criminal actions ; nay, such was the power of popular prejudices over weak minds, that the very decisions of
some

some of the courts were tinged with that doctrine. It was undoubtedly an abominable doctrine; I thought so then, and think so still; but nevertheless it was a popular doctrine, and came immediately from those who were called the friends of liberty, how deservedly time will shew. True liberty, in my opinion, can only exist when justice is equally administered to all, to the king, and to the beggar. Where is the justice, then, or where is the law, that protects a member of parliament more than any other man from the punishment due to his crimes? The laws of this country allow of no place nor no employment to be a sanctuary for crimes; and, where I have the honor to sit as judge, neither royal favour nor popular applause shall ever protect the guilty.

"I have now only to beg pardon for having employed so much of your lordships' time; and I am very sorry a bill, fraught with so good consequences, has not met with an abler advocate; but I doubt not your lordships' determination will convince the world that a bill, calculated to contribute so much to the equal distribution of justice as the present, requires, with your lordships, but very little support."

The title of this salutary act is, "An Act for the farther preventing the Delay of Justice by Reason of Privilege of Parliament*."

Motion for a new trial in the cause of *Rex versus Almon* †.

The defendant having been convicted of publishing a libel (Junius's Letter) in one of the magazines, called *The London Museum*; which was bought at his shop, and even professed to be 'printed for him;'

His counsel moved, on Tuesday the 19th of June, 1770, for a new trial; upon the foot of the evidence being insufficient to prove any *criminal intention* in Mr. *Almon*, or even the least *knowledge* of their being sold at his shop. And they had affidavits to prove, that it was a frequent practice in the trade, for one publisher to put another publisher's name to a pamphlet, as printed for that other, when in fact it was published for himself. That

* 13 Geo. III. Ch. 50.

† Michaelmas Term, 1770. 5 Burr. 2686.

this was the fact in the present case; Mr. Miller being the real publisher of this *Museum*, but having advertized it and published it as printed for Mr. Almon, without consulting Mr. Almon, or having his consent or approbation. That, on the contrary, as soon as he saw his name put to it, as being printed for him, he immediately sent a note to Mr. Miller, expressing his disapprobation and dissatisfaction. That he himself had no concern whatever in this *London Museum*. That he was not at home when they were sent to his shop. That the whole number sent to his shop was 300. That about sixty-seven of them had been sold there by a boy in the shop, but without Mr. Almon's own knowledge, privity, or approbation. That, as soon as he discovered it, he stopt the sale, ordered the remainder to be carried up into his garret, and took the first opportunity to return them to Mr. Miller; that it was not proved, that the person who sold them was Mr. Almon's servant, or employed by him; or that Mr. Almon was at all privy to the sale.

On Wednesday the 27th of June, 1770, it came on again; and serjeant Glynn argued, that the proof against Mr. Almon appeared therefore to be defective: There was nothing to constitute criminality, or induce punishment.

That, after the jury had been out about two hours, one of them (Mr. Mackworth) proposed a doubt, "Whether the bare proof of the *sale* in Mr. Almon's shop, *without* any proof of privity, knowledge, consent, approbation, or *malus animus*, in Mr. Almon himself, was sufficient in law to convict him criminally of publishing a libel."

Mr. Mackworth understood his lordship's answer to this doubt to be this: "That this was conclusive evidence." Otherwise, Mr. Mackworth was convinced in his own mind, that the defendant ought not to be found guilty upon this evidence; nor would he have found him guilty. He certainly gave his verdict under a mistake. If he had apprehended that the jury were at liberty,

liberty, to exercise their own judgement, he would have acquitted the defendant.—The Serjeant prayed, that Mr. Mackworth's affidavit might be read.

Lord Mansfield. “You know it can't be read.”

Mr. Justice Aston. “A juryman's affidavit with regard to his sentiments in point of law, at the trial, ought not to be admitted; whatever may be the case of his affidavit tending to rectify a mistake in fact.”

Lord Mansfield, in reporting the evidence, said, “He had told the jury, that there was evidence of the publication, if they believed the witnesses. And he said, he had directed them (as he always had done, and as he took the law to be), that if they were not satisfied that the blanks were filled up, in the information, in the *true* sense and meaning of the writer, they ought to acquit the defendant: and that the epithets used in the information were inferences of law, drawn from the paper itself; and not facts to be *proved*.”

“The court were of opinion, that none of the matters urged on behalf of the defendant, nor all of them added together, were reasons for granting a new trial; whatever weight they might have in extenuation of his offence, and in consequence lessening his punishment. For, they were exceedingly clear and unanimous in opinion that this pamphlet being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, is a sufficient *prima facie* evidence of its being published by him: not, indeed, conclusive, because he might have contradicted it, if the facts would have borne it, by contrary evidence. But, as he did not offer any evidence to repel it, it must (if believed to be true) stand good *till* answered, and be considered as conclusive till contradicted.”

“*Lord Mansfield* said, and repeated, that Mr. Mackworth had understood him perfectly right; and he was very glad to find that there was no doubt of what he had said. The substance of it was, that in point of *law*, the buying the pamphlet in the public open shop of a known professed book feller and publisher of pamphlets, of a person acting in the shop, *prima facie* is evidence of a publication *by* the master himself; but that it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master, and to shew that he was not privy nor assenting to it, nor encouraging it. That this being *prima facie* evidence of a publication by the master himself, it stands good *till* answered by him; and, if not answered at all, it thereby *becomes conclusive* so far as to be sufficient to convict.”

vict him. That proof of a public exposing to sale and selling at his shop, by his servant, was *prima facie* sufficient; and must stand *till* contradicted or explained or exculpated by some other evidence; and, if not contradicted, explained, or exculpated, would be, in point of evidence, sufficient or tantamount to conclusive. Mr. Mackworth's doubt seemed to be 'whether the evidence was sufficient to convict the defendant, in case he believed it to be true;' and in this sense I answered it, *prima facie*, 'tis good, and remains so till answered. If it is believed, and remains unanswered, it becomes conclusive. If it be sufficient in point of law, and the juryman believes it, he is bound in conscience to give his verdict according to it.

"In practice, in experience, in history, in the memory of all persons living, this is, I believe, the first time that it was ever doubted 'that this is good evidence against a bookseller or publisher of pamphlets.' The constant practice is, to *read* the libel as soon as ever it has been proved to be bought at the defendant's shop. This practice shews that it is considered as *already proved upon the defendant*; for, it could not be read against him before it had been proved upon him.

"If I am mistaken, I am entirely open to alter my opinion, upon being convinced that it is a wrong one. But, at present, I take this point to be as much established as that an eldest son is, in general, heir to his father; and, being evidence *prima facie*, it stands, if believed, till contrary proof is brought to repel it."

The other judges delivered *seriatim* their opinions, and concurred with lord Mansfield.

The court therefore unanimously discharged the rule to shew cause why there should not be a new trial.

The speech of lord Mansfield, in giving his charge to the jury in the case of the King against Woodfall for a libel.

"Though the court will not yet determine whether the affidavit of any of the jury may be read in this cause, yet I have permitted one to be read a little *by way of stating it*; and I there find, that the application of the Innendoes is not denied, only the *criminal construction* put upon the paper in the information. To have denied the one would have been very material; with the other they have nothing to do. In that case, there would be no proof to them

them of the paper, as charged in the information : but, if the jury find that the defendant published at all, they find the paper as charged in the information ; for, that is their only enquiry. I take it from the affidavit which has been stated, that it does not appear whether the jury meant to say that the paper is no libel ; if they had the least doubt whether the Innuendoes were properly supplied, there should be a new trial. I did not leave it to the jury, whether the paper was innocent or not. I never do. I summed up to them, as I have always done in similar cases, that if they were not satisfied of the fact of publication, or had a doubt of the application of any of the words in the information to the blanks in the letter, they must acquit the defendant. But I told them also, that whether the paper was criminal or innocent was to them a subject of indifference ; because, if innocent, judgement would be arrested in this court. Here the jury did not mean to find the malice of the defendant, because it was not within their inquiry ; nor did they mean to exclude it, because it was not within their power to exclude a legal deduction.

There may be something of a distinction in books about amending a verdict in civil and in a criminal case ; but it is a mistake, and there is nothing in it. In the case of Gibson for forgery, all the judges were of opinion, that, where the officer had drawn up the verdict *contrary* to the finding of the jury, it might be amended. There is a case of this sort in the Year-books as early as the third of Richard III. I forget the page, as I speak only from the memory of my reading. This is the only way of altering a *verdict*, either in a criminal or civil case. There is, indeed, a sound distinction which holds in the *pleadings* ; for those cannot be amended in criminal matters.

“ Whatever may be the inclination of my opinion in this case, it is too late to have any effect from it in this term : therefore let it stand over to the next.”

Lord Mansfield's charge to the jury, on an information filed against the printer of the London Evening Post, for republishing Junius's Letter to the King.

“ I have the satisfaction to know that, if I should be mistaken in the direction I am about to give as to your duty on the present occasion, it will not be final and conclusive ; but it is under the full conviction of my own mind, that I am warranted, by the uniform practice of past ages, and by the

law

law of the land, that I inform you, that the question for your determination is, whether the defendant printed and published a paper of such tenor and meaning as is charged by the information? If the tenor had been wrong, the prosecution would at once have fallen to the ground; but that is not objected to, nor is any meaning suggested by the defendant different to that supplied by the filling up the blanks in the information. If you find the defendant not guilty, you find he did not print and publish as set forth; if you find him guilty, you find that he did print and publish a paper of the tenor and meaning set forth in the indictment. Your verdict finally establishes that fact; but you do not by that verdict find whether that production was legal or illegal, for, should the defendant be found guilty, he may arrest the judgement, by insisting there is nothing illegal in this paper, and may carry this matter before the highest court of judicature in this kingdom. Nor do you find, by that verdict, that he did it with any degree of malice or guilt, more than appears from the face of the publication. Nothing can be more various than the manner of publication, which may be attended with the highest degree of guilt, or with circumstances that make it a venial matter. It is certain, all the epithets of *malicious*, *sedition*, &c. given in the information, are inferences in law; and it is admitted that it is needless to give any proof about them.

“The defendant, after conviction, may be heard to extenuate his offence on his own affidavit, as was lately admitted in the case of one of the persons convicted of publishing the letter before you, which is a proof that the criminality of the fact is not determined by the jury. If you don't believe that the tenor and meaning of this paper are not rightly set forth in the information, or, if you disbelieve the evidence given to bring the publication home to the defendant, you must acquit him; but, if you are satisfied in those points, you must find him guilty. If you chuse to *determine the point of law*, you should be very sure, for your consciences sake, that your determination is law; but if the law was in every case to be determined by juries, we should be in a miserable condition, as nothing could be more uncertain from the different opinions of mankind.

“After this the jury withdrew, and brought in the verdict not guilty.”

The unanimous opinion of the judges of the court of King's Bench, in the cause of the King against Woodfall, cannot fail to be acceptable to the curious reader.

It

It was read by lord Mansfield on the 20th of November, 1770, in the House of Lords, in justification of his conduct in that important cause *.

“ This comes before the court upon two rules.

“ The first obtained by the defendant to stay the entering up judgement on the verdict given in this cause.

“ The second obtained by the attorney-general, that the verdict may be entered according to the legal import of the finding of the jury.

“ The last rule must, from the nature of it, be first discussed, because the ground of argument upon the other cannot be settled till this is disposed of.

“ Upon this rule it is necessary to report the trial.

“ This prosecution is an information against the defendant, for printing and publishing a libel in the Public Advertiser, signed Junius.

“ The tenor of which is set out with proper averments as to the meaning of the libel, the subject-matter, and the persons concerning which and of whom it speaks, with Inuendos filling up all the blanks and the usual epithets.

“ In support of the prosecution, they proved by Nathaniel Crowder, that he bought the paper produced and twelve more from Colfield, the defendant's publisher, in the defendant's publishing room, the corner of Ivy-lane.

“ That he goes often there, has occasionally seen the printing room, and has had papers in the printing room.

“ They read the paper produced, and the tenor agreed with the information.

“ George Harris, register of pamphlets and newspapers, proved that the defendant himself, and servants, paid the money for advertisements in the Public Advertiser; that defendant had paid himself, and all the payments were on his account.

“ That the defendant has made the usual affidavit, and has been allowed the stamp-duty for such papers as were unfold.

“ That the duties on advertisements in the paper now in question were paid by defendant's servants, and the receipt given on defendant's account.

* 5 Burr. 2661. State of the previous Proceedings.

“ William Lee, clerk to Sir John Fielding, proved, that he often carried advertisements for the Public Advertiser to the defendant's, the corner of Ivy-lane.

“ That he generally paid ready money, that he had seen money paid to the defendant for advertisements, and he had a receipt from the defendant signed by him the 29th of November for thirty-two pounds, for printing advertisements in the Public Advertiser.

“ On the part of the defendant, they called no witnesses.

“ His counsel objected to some of the Inuendos; but they principally applied to the jury to acquit the defendant, from the paper being innocent, or not liable to the epithets given it by the information, or, that the defendant's intent in publishing did not deserve the epithets in the information.

“ There was no doubt but that the evidence, if credited, amounted to proof of printing and publishing by the defendant.

“ There may be cases, where the fact proved as a publication may be justified or excused, as lawful or innocent; for, no fact which is not criminal, in case the paper be a libel, can amount to a publication of which a defendant ought to be found guilty.

“ But no question of that kind arose in this cause.

“ Therefore I directed the jury to consider, whether all the Inuendos, and all the applications to matter and persons, made by the information, were in their judgement the true meaning of the paper.

“ If they thought otherwise, they should acquit the defendant; but, if they agreed with the information, and believed the evidence as to the publication, they should find him guilty.

“ If the jury were obliged to find, whether the paper was a libel, or whether it was a libel to such a degree as to deserve the epithets given it by the information, or to require proofs of the express intent of the defendant in printing and publishing, and of its being malicious to such a degree as to deserve the epithets given by the information; then this direction was wrong.

“ In support of it, I told them, as I have, from indispensable duty, been obliged to tell every juryman, upon every trial of this kind, to the following effect.

“ That whether the paper (meaning as alleged by the information) was in law a libel was a question of law upon the face of the record; for, after
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conviction, a defendant may move in arrest of judgement, if the paper is not a libel.

“ That all the epithets in the information were formal inferences of law from the printing and publishing.

“ That no proof of express malice was ever required, and is in most cases impossible to be given.

“ That the verdict finds only what the law infers from fact; therefore, after conviction, a defendant may, by affidavits, lessen the degree of his guilt.

“ That where an act in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but, where the act is in itself unlawful, as in this case, the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent.

“ The jury stayed out a great while, many hours; at last they came to my house, (the objection of its being out of the county being cured by consent.) In answer to the usual question put by the officer, the foreman gave their verdict in these words, ‘ *guilty of printing and publishing only.*’ Nothing more passed.

“ The officer has entered up the verdict literally, without so much as adding the usual words of reference, to connect the verdict with the matter to which it is related.

“ Upon this, the two rules I have stated were moved for.

“ Upon that obtained by the attorney-general, the affidavit of a juror was offered by the counsel for the defendant.

“ But we are all of opinion that it cannot be received.

“ Where there is a doubt upon the judge’s report, as to what passed at the time of bringing in the verdict, there the affidavits of jurors or bystanders may be received, upon a motion for a new trial, or to rectify a mistake in the minutes.

“ But the affidavit of a juror never can be read as to what he then thought or intended.

“ This motion consists of two parts: first, to fill up the formal words of reference; second, to omit the word *only*.

“ We are all of opinion, that the first is a technical omission of the clerk, and ought to be set right.

“ As to the second, that the word *only* must stand in the verdict.

“ There is no ground (from any thing which passed) to explain the sense of the jury, so as that the officer ought to have entered a general verdict.

“ No argument can be urged for omitting the word *only*, which does not prove that it can have no effect though inserted; and therefore it is a question of law upon the face of the verdict.

“ The defendant's motion must be considered upon the ground of the word *only* standing; was it omitted, there could be no doubt.

“ Guilty of printing and publishing, where there is no other charge, is guilty; for, nothing more is to be found by the jury.

“ In the case of the king against Williams, the jury found the defendant guilty of printing and publishing the North Briton, N^o 45; the clerk entered it up guilty, and no objection ever was made.

“ Where there are more charges than one, guilty of some *only* is an acquittal as to the rest.

“ But in this information there is no charge, except for printing and publishing.

“ Clearly, there can be no judgement of acquittal; because the fact found by the jury is the very crime they were to try.

“ The only question is, whether by any possibility the word *only* can have a meaning which would affect or contradict the verdict.

“ That the law, as to the subject-matter of the verdict, is as I have stated, has been so often unanimously agreed by the whole court, upon every report I have made of a trial for a libel, that it would be improper to make it a question now in this place.

“ Among those who have concurred, the bar will recollect the dead, and the living not now here.

“ And we all again declare our opinion that the direction is right, and according to law.

“ This direction, though often given (with an express request from me, that if there was the least doubt they would move the court), has never been complained of in court; and yet, if it had been wrong, a new trial would be of course.

“ *It is not now complained of.*

“ Taking then the law to be according to this direction, the question is, whether any meaning can be put upon the word *only*, as it stands upon the record, which will affect or contradict the verdict?

“ If

“ If they meant to say, that they did not find it a libel, or did not find the epithets, or did not find any express malicious intent; it would not affect the verdict, because none of these things were to be proved or found either way.

“ If, by *only*, they meant to say that they did not find the meaning put upon the paper by the information, they should have acquitted him.

“ If they had expressed this to be their meaning, the verdict would have been inconsistent and repugnant; for they ought not to find the defendant guilty, unless they find the meaning put upon the paper by the information, and judgement of acquittal ought to have been entered up.

“ If they had expressed their meaning in any of the other ways, the verdict would not have been affected, and judgement ought to be entered upon it.

“ It is impossible to say with certainty what the jury really did mean; probably they had different meanings.

“ If they could possibly mean that which, if expressed, would acquit the defendant, he ought not to be concluded by this verdict.

“ It is possible some of them might mean, not to find the whole sense and explanation put upon the paper by the inuendos in the information.

“ If a doubt arises from an ambiguous and unusual word in the verdict, the court ought to lean in favor of a *venire de novo*.

“ We are under the less difficulty, because, in favor of a defendant, though the verdict be full, the court may grant a new trial.

“ And we are all of opinion, upon the whole of the case, that there should be a new trial.”

Lord *Camden*, after reading the contents, it is said, declared, that he considered the paper delivered in by lord *Mansfield* as a challenge to himself, which he accepted, and the glove was thrown down, and *he* took it up. That he was ready to meet him in defence of the laws of his country, and desired a day might be fixed. In the mean time the following paper was likewise left with the clerk.

“ 1. Does the opinion mean to declare, that upon the general issue of not guilty, in the case of a seditious libel, the jury have no right, by law, to examine the innocence or criminality of the paper, if they think fit, and to form their verdict upon such examination?

“ 2. Does

“ 2. Does the opinion mean to declare, that in the case above mentioned, when the jury have delivered in their verdict *guilty*, that this verdict has found the fact only, and not the law ?

“ 3. Is it to be understood by this opinion, that if the jury come to the bar, and say, that they find the printing and publishing, but that the paper is no libel : that in that case the jury have found the defendant guilty generally, and the verdict must be so entered up ?

“ 4. Whether the opinion means to say, that if the judge, after giving his opinion ? of the innocence or criminality of the paper, should leave the consideration of that matter together with the printing and publishing to the jury, such a direction would be contrary to law.

“ 5. I beg leave to ask, whether dead and living judges, then absent, did declare their opinions in open court, and whether the noble lord has any note of such opinions ?

“ 6. Whether they declared such opinions, after solemn arguments, or upon any point judicially before them ?”

Lord *Mansfield* replied,

“ That this method of proposing questions to him was taking him by surprize ; that it was unfair ; and that he would not answer interrogatories.”

It is not easy to reconcile the propriety or the probability of lord Camden's having used the authoritative style, which, at the opening of his queries, has been ascribed to him, with the general tenor of the decorous language of one lord chief justice to another. To the queries themselves it was reasonable to demur, since it was not within the scale of probability that the unanimous opinion of the court of King's Bench, formed after great deliberation, and upon a question of real importance, should be so obscure, so devoid of precision, as to stand in need of being twisted into the form of a few questions, divided and subdivided, by way of interrogatories.

“ *Animi motibus sermo debet vacare,
Ne aut ira existat, aut cupiditas aliqua—appareat.*”

Cic. de Offic.

An

An appeal of death was brought by the widow of the person killed at Brentford, in Middlesex, pending a general election.

“The following case * of Bigby against the two Kennedys (says Sir James Burrow) is of so peculiar a nature, and upon a subject which occurs so very seldom, that I have been intentionally very minute and circumstantial in describing the method and form of proceeding in it; as I conceive it may not only be an amusement to the curiosity of some readers, but may also be useful as a precedent, and save the trouble of searching into rule-books and records, whenever a future appeal shall happen to be brought; especially as this was an appeal against two different persons, who were brought into court *at different times and from different custodies.*”

In consequence of an introductory note so curious as the present, an apology may, by some readers, be deemed necessary, on the part of the author of these sheets, for omitting to state a case of so peculiar a nature. His apology is, that the duties of a reporter and a biographer are very different; and although the length of this report extends to fourteen folio pages, yet there is not in any one of them any speech or observation of lord Mansfield's which consists of three lines.

The proceedings upon another appeal of death, brought by the widow of James Smith, produced another similar instance, and are faithfully reported by Sir James Burrow, in his fifth volume, 2793.

Non-residence of Clergy.

Henry Law, who &c. *versus* James Ibbetson †, D. D. in debt upon the Stat. of 21 H. VIII. for non-residence; the defendant pleaded the general issue.

* Michaelmas Term, 1770. 5 Burr. 2643.

† 5 Burr. 2722. 30 April, 1770.

Upon trial, at the last assizes for the county of Hertford, a verdict was given for the plaintiff for 10*l.* subject to the opinion of the court upon this case; *viz.*

“ The defendant, beneficed with the rectory of the parish church of Bushey, to which there is a good *parsonage-house* belonging, during all the time mentioned in the declaration performed the duty of rector of the said parish, but was *personally resident and abiding* in and upon a *dwelling-house* belonging to himself, in Bushey, in the parish of Bushey, and not in and upon the said *parsonage-house* belonging to the said rectory. The defendant also, during all the time aforesaid, was and still is archdeacon in and throughout the whole archdeaconry of St. Alban's, and the limits thereof; which is an ecclesiastical *dignity*, with jurisdiction of granting licences for marriages, probate of wills, and letters of administration. He has a *seat* in the church of St. Alban's; has a *deputy-register*, who lives at St. Alban's, and keeps an office there: but the seal of office is kept by the defendant in his own custody; to whom the said deputy-register applies for the use of the seal and the dispatch of business.

“ The *house* in which the defendant was and is *resident and abiding* is within the limits of the said archdeaconry (as is also his rectory-house), but is not belonging, nor is there any *house* which does belong, to his archdeaconry as an archidiaconal house.

“ The question for the opinion of the court is, ‘ Whether, under these circumstances, the plaintiff is intitled to recover ?’

Lord Mansfield. “ The words of the act of parliament are very pointed and very precise. They are *, ‘ that as well every spiritual person now being promoted to any archdeaconry, deanry, or dignity, in any monastery or cathedral church, or other church, conventual, or collegiate, or being beneficed with any parsonage or vicarage, as all and every spiritual person and persons which hereafter shall be promoted to any of the said dignities or benefices, with any parsonage or vicarage, from the feast of Saint Michael the Archangel, next coming, shall be personally resident and abiding in at and upon his said dignity, prebend, or benefice, or at one of them at the least.—And in case

* 21 Hen. VIII. c. 13. s. 26.

that any such spiritual person, at any time after the said feast, keep not residence *at one* of his said dignities, prebends, or benefices, as aforesaid, but absent himself wilfully by the space of one month together, or by the space of two months, to be accounted at several times in any one year, and make his residence and abiding in any other places by such time, that then he shall forfeit, &c,

The determinations upon adjudged cases are, 'that if he does not reside upon one or the other, he is within the penalty; and, that if there be a house upon the parsonage, or dignity, he must reside *in that house*, it not being sufficient to reside in any *other house*, though it be within the parish.'

"If there be no house, then indeed he may reside where he will, provided it be within the parish: for he cannot, upon a penal act, be punished for not residing in the house, when there is no house for him to reside in."

"Residence is a *technical* term: he must shew, that he was resident within the technical sense under the act of parliament."

"His lordship was of opinion, that the plaintiff should have judgment."

The other judges delivered their opinions *seriatim*; and the whole court concurred in opinion for the plaintiff.

Note. There was afterwards a case in this court, on Friday, 3d May, 1776, Wilkinson, esquire, who, &c. *v.* Allot, clerk; where there was *no* parsonage-house, and therefore the parson absented himself entirely, and did not reside in the parish at all: and the court held, that though impossibilities will indeed excuse, yet he must come *as near as he can* to residing in the parsonage-house—he must reside *somewhere within* the parish.

Lord Mansfield's speech in the last mentioned cause was as follows:

"The statute of non-residence is a beneficial law; and, though a penal one, has received a strict construction against such as have offended."

"A clergyman with cure of souls is bound, not only by the canon law, but in conscience, to attend his duty in person if he can. By experience it was found, that neither conscience nor canon law were sufficient to bind the clergy to a due observance of their parochial duty; but they left it to be done by poor curates, hired at small salaries. It would be a strange argu-

ment to say, that persons of that description could possibly maintain the hospitality which the statute had in view, and which ought to be kept up. The Stat. 21 H. VIII. c. 13. was made to remedy this grievance, and the words are general, 'that every spiritual person &c. shall *reside, in, at, and upon* his *benefice*;' it does not say *in, at, and upon* his *parsonage-house*. The word *benefice* was indeed formerly used to denote certain portions of land given by lords to their followers for their maintenance, but now it is a general term for any ecclesiastical living or preferment. In this case the *benefice* is a *parsonage*, or vicarage, and the general words used by the act might be satisfied by his residing *any where* upon the living. However, authorities as far back as the time of Elizabeth say that that construction does not answer the end; but it must be a *residence in the parsonage-house*. It is a remedial and beneficial law both for the parish and the successor; and cases have been determined, where, though the parson lived within twenty yards of the parsonage-house, and though he had a servant who slept in it*, yet it was holden not to be a legal and sufficient residence.

"It is true, the law says, that in all restrictions imposed, impossibility is an excuse; but then it must be performed *cy près*. If there has been no parsonage-house from time immemorial, it is most certain that the parson cannot live in it. What then?—The next thing to be done is, to come as near to it as he can. He must live *somewhere in the parish*. His conscience obliges him to do so. The canon law requires it, and this statute enforces the obligation under a penalty. It is said, that in *Law v. Ibbetson*, I did say, 'that if there was no parsonage-house, the parson might reside where he pleased;' but it is clear that must mean *somewhere in the parish*. Any other construction would be a shameful evasion of the statute. Here there is no parsonage-house: but the want of a parsonage-house is no excuse for residing out of the parish entirely; and therefore there must be judgement for the plaintiff.

Hilary Term 1771.

On the first day of this term †, the great seal (lord Mansfield having again declined accepting it) was delivered by the king to

* 2. Brownlow, 54.

† 5. Burr. 2692.

the lord commissioner Bathurst, as lord chancellor of Great Britain, who was upon this occasion made a peer of the realm.

Cafe on a wager.

Earl of March *versus* Pigot*.

A verdict having been found for the plaintiff, Mr. Lee moved, on behalf of the defendant, for a new trial.

The cause was tried before lord *Mansfield*. It was a contract hatch'd at Newmarket. The wager was originally proposed between young Mr. Pigot, the present defendant, and young Mr. Codrington, to run their fathers (to use the phrase of the place) each against the other. Sir William Codrington, the father of Mr. Codrington, was then a little turned of 50. Mr. Pigot's father was upwards of 70. Lord Ossory computed the chances according to the above-mentioned ages of their respective fathers. Mr. Codrington thought the computation was made too much in his disfavor. Whereupon lord March agreed to stand in Mr. Codrington's place: and reciprocal notes were accordingly given between the earl and Mr. Pigot. Mr. Pigot's note ran thus: 'I promise to pay to the earl of March 500 guineas, if my father dies before Sir William Codrington. WILLIAM PIGOT.' The earl's was: 'I promise to pay to Mr. Pigot 1600 guineas, in case sir William Codrington does not survive Mr. Pigot's father. MARCH.' No mention was at all made, at the time of this transaction, about their fathers being then *dead* or *alive*. But the fact was that Mr. Pigot's father was then actually *dead*: he died in Shropshire, 150 miles from London, at two o'clock in the morning of the *same* day on which this bet was made at Newmarket, after dinner. However, this fact was not at that time at all known to any of the parties, nor was there any reason for suspecting that Mr. Pigot's father was then dead.

* 5. Butt. 2802.

There was no objection made at the trial against going into parol evidence. Lord Mansfield left the matter to the jury; who found a verdict for the plaintiff with 525*l.* damages.

Lord Mansfield:—"If the present case had stood upon written evidence only, it had been matter of law; but there was no objection made at the trial against going into parol evidence.

"The question is, 'what the parties really meant?' The material contingency was, 'which of these two young heirs should come to his father's estate first?' It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted, nor excepted. It was equal to both of them, whether one of their fathers should be then sick or dead. All the circumstances shew, that if it had been thought of, it would not have made any difference in the bet; and there was no reason to presume that they would have excepted it.

"The intention was, that he who came first to his estate should pay this sum of money to the other, who stood in need of it. That the event which *had* happened, was in the contemplation of neither party.

"Both notes are so penn'd, as to be applied to what was *to happen*. But the nature of such a contract, and the manifest intention of the parties, support the verdict of the jury, (to whom it was left without objection,) 'that he who succeeded to his estate first, by the death of his father, should pay to the other, without any distinction whether the event had or had not at that time actually happened.'

The court unanimously discharged the rule for a new trial.

In Trinity Term, 1771*, a case of great importance to those who possess a species of landed property at the will of the lord of

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* The jurisperit will have the pleasure and advantage of finding in 5th Burr. 2766 †, the following introduction by Sir James Burrow. 'As it is a case of very curious learning, and was very well argued and maturely considered by the court, I will endeavour to give the very words of the respective speakers, as nearly as I can;' Twenty pages in folio are usefully employed

† Vaughan on the demise of Atkins v. Atkin's widow.

a Manor, respecting the legal construction of surrenders and admittances of and to customary and copyhold lands, was very ingeniously

employed therein. At the close of the arguments, Lord Mansfield said, "The court were very much obliged to the gentlemen for taking so much pains in their arguments; and he thought nothing could be added to them: therefore there was no need of any further argument; but it might stand for the opinion of the court.

"He hinted, however, that no case in point had been cited by Mr. Grose; nor any in point by Mr. Kerby, except out of Gilbert. The great question, is the *relation of the admittance to the time of the surrender.*

Curia advisare vult.

"And now Lord Mansfield delivered their opinion.

"What is stated relative to the premises not being *copyhold at the will of the lord*, makes no difference as to the *question*: and, therefore, I shall consider it as a *general* point, common to all estates which *pass by surrender and admittance.*

"The question is, 'whether the heir of the surrenderee, who dies before admittance, shall avoid the free-bench or customary dower of the widow, *because* he died before admittance.' The case has been extremely well argued; and, therefore, I shall be but short in giving our opinion; the whole having been exhausted in the arguments.

"In this case the contract is for a purchase and sale.

"The surrender is the *substantial* part of the conveyance, and a *complete* execution of the contract as between the *vendor* and the *vendee.*

"The surrender and the admittance are different parts of the *same conveyance.* The *former* effectuates the *substantial* part; and therefore must *relate* to it. Both together make but *one* conveyance. The admittance must be pursuant to the surrender; and consequently must *operate* as from the *date* of it.

"Surrender to A. before admittance, surrenderor dies: A. is afterwards admitted*. A. shall avoid the free-bench of the widow of the surrenderor; for A's admission has *relation to the surrender.*

"If one joint-tenant surrenders to the use of his will†; his devisee shall take: for the admittance *relates* to the surrender; and from that time severs the joint-tenancy.

"It is laid down, 4 Co. 49 b. that the lord is only an instrument. That, after admittance the surrenderee, is in by him who made the surrender. That although the surrenderor, or the tenants by whose hands the surrender was

* Benfon v. Scot. 3 Lev. 385. 1 Salk. 185.

† Co. Litt. 59 b.

geniously and elaborately argued by Mr. Grose, now sir Nash Grose, one of the justices of that court, as counsel for the lessor of the plaintiff, and by Mr. Kerby for the defendant.

Wreck

was made, die; yet presentment and admittance afterwards is good: and where he to whose use the surrender is made, before admittance, dies, his heir shall be admitted. The true reason is drawn from the context, and given in Bacon's Abridgment*: for, upon admittance, the estate is *cestuy qui use* from the time of the surrender *by relation*.

“Moor's case†, Trinity Term, 40th Elizabeth, referred to by Justice Newdigate, in the case of Blunt v. Clarke, is not stated, nor does it appear what the question was. The proposition in Roll's Abridgement, ‘that the heir being admitted, is in by the lord, and *not* by him that made the surrender,’ is contrary to truth, and to all the authorities. The lord is a mere instrument; and cannot vary from the surrender. And in the same case of Blunt v. Clarke, (reported afterwards in the same book‡, 2 Siderfin, 61,) Glynn, Chief Justice, says, ‘if a man seised of copyhold in burrough-english surrenders to the use of J. S. and his heirs; and J. S. dies before admittance, leaving two sons; the younger of them shall have the land; because he is in by descent, or at least by force of the first surrender, and so in nature of a descent.’ And it is said in the Treatise of Tenures ascribed to lord chief baron Gilbert, and, I suppose, written by him, ‘that his opinion|| seems to be very reasonable; for *heirs* was certainly there a word of limitation and not of purchase; and certainly there is as much reason to adjudge the heir in by descent here, as there is to judge an heir in by descent, where a recovery was had against the ancestor, but not executed till after his death, because the use might have vested during the life of the ancestor, and because the execution hath a retrospect. And in truth, the case of a surrender is just the same; for, admittance might have been in the life of the ancestor; and when it was had it had a *retrospect*.’ And in the margin he refers to Shelly's case in 1 Co. 106. where the opinion was, ‘that the execution had a retrospect to the recovery.’

“With this reasoning we agree; and are of opinion, ‘that, upon *admittance*, the heir is in, *by descent*, from the surrender to which the admittance relates.

“The lessor of the plaintiff in this case is expressly admitted *as heir*. The law casts the free bench upon the widow just as it casts the descent upon the heir

* 1 Vol. 476.

† 2 Siderfin, 38. 1 Roll. Abr. 627. pl. 9.

‡ It is a second argument and determination of the case.

|| Page 288, in the third edition.

Wreck of the Sea.

Trinity Term, 1771 *.

A motion had been made last term for a new trial. The cause had been tried before the chief justice of Chester and the other judge of that circuit.

Lord Mansfield in his speech has so clearly shewn the *cardo causæ*, and the nature of the doubts and difficulties in this cause, as to make any farther statement of it unnecessary and improper.

Lord Mansfield. "There is no sort of doubt concerning the true ownership of these goods, which were cast away in a storm, and recently pursued. Every body else restored to the true owner the proportions that they had got of them, upon a proper salvage offered: This defendant refused to deliver

heir. The admittance by *relation* makes her husband seised from the date of the surrender.

"There is no rule better founded in law, reason, and convenience, than this, That all the several parts and ceremonies necessary to complete a conveyance shall be *taken together as one act*, and operate from the substantial part *'by relation.'*

"Livery relates to the feoffment inrollment to the bargain and sale; a recovery, to the deed which leads the use: so admittance shall relate to the surrender, especially when it is a sale for a valuable consideration, as in this case.

"The title is not complete till admittance; and to the lord it is material, in respect of his fine; but as between the parties, the vendor and vendee, the admittance is mere form. This agreement is executed, and the land bound by the surrender. The lord is compellable, by Mandamus or decree, to admit. The vendor, his widow, his heir, and all claiming under him, are concluded from saying, after admittance, 'that the land did not pass *from the day* of the surrender.' Upon this ground the lessor of the plaintiff claims the inheritance whereof his brother died seised; it shall not be in his mouth to say, against the widow, 'that his brother did *not* die seised.'

"Therefore let judgement be for the defendant.

"Judgement for the defendant."

* 5 Burr. 2732.

the share that he had got being forfeited, according to his apprehension, as a *wreck*, because no *live* animal came ashore. He likewise objects to the plaintiff's recovering; because certain forms, which he says were requisite to be performed, have not, as he alleges, been properly performed.

“The first question is, ‘Whether these goods are forfeited?’ Now, no case is produced, either at common law, or on the construction of the statute of 3 Edw. I. c. 4. to prove that the goods were forfeited, *because* no dog or cat or other animal came *alive* to shore. I will therefore presume, that there *never was* any such determination; and that no case could have been determined so contrary to the principles of law, justice, and humanity. The very idea of it is shocking. And there is no ground for such a forfeiture, upon the distinction that has been so much urged between a man or other animal coming to shore *alive* or not alive. The coming to shore of a dog or a cat alive can be no better proof, than if they should come ashore dead. The escaping *alive* makes no sort of difference. If the owner of the dog or cat or other animal was known, the presumption of the goods belonging to the same person would be equally strong whether the animal was alive or dead. If no owner could be discovered, the goods belonged to the king. But there ought to be a reasonable time allowed to the owner to come in and claim them; and it was proper that the time should be limited. The old limitation was a year and a day; which was the time limited in many other cases*. The *mode* of proof was as it might happen. Goods are now, generally, marked; perhaps in antient days it might not be so common nor so accurate; and then a dog or a cat might be a presumption towards ascertaining the owner of the goods. *Bracton*, who wrote in the time of Henry III. says †, ‘Magis propriè dici poterit wreccum, si navis frangatur, &c. nisi ita fit, quod verus dominus aliunde veniens, *per certa indicia & signa* docuerit res esse suas; ut si canis vivus inveniatur &c. & eodem modo, si *certa signa* apposita fuerint mercibus & aliis rebus.’ And *Bracton*’s opinion has been recognized by later writers. Lord *Coke*, in his fifth Report, 107, says ‡, that it appears from *Bracton*, that the statute of William I. was but

* See 7th Co. 107^b, 108^a.

† Lib. 3. c. 3. p. 120^a.

‡ See also 2 Inst. 166.

a declaration of the common law, and cites the same passage from *Bracton*, 'Et quòd hujusmodi dici debet wreccum, verum est, nisi sit quod verus dominus aliunde veniens, *certa indicia & signa* donaverit res esse suas; ut si canis vivus inveniatur, & constare poterit quòd talis sit dominus illius canis; presumptivè ex hoc, illum esse dominum illius canis & illarum rerum: eodem modo, si *certa signa* imposita fuerint *mercibus*.' Thus it stands at the common law. Then, has the statute of 3 Edw. I. c. 4. *altered* the common law? No: quite otherwise. And this act was made *in favor* of the owner. It enacts, negatively, 'that it shall *not* be wreck, if man, dog, or cat, escape alive;' but it has no contrary, positive, provision, 'that if neither man, dog, nor cat, &c. escape alive, it shall belong to the king.' This statute has been recognized as declaratory of the common law. The words of it are, 'Concerning wreck of the sea it is agreed, that where a man, a dog, or a cat, escape quick out of the ship, that such ship, nor barge, nor any thing within them, shall be adjudged wreck; but the goods shall be saved and kept, &c. so that if any sue for those goods, and afterwards prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and, if not, they shall remain to the king.' Lord Coke says, that 'these three instances, of a man, dog, or cat, are put but for examples; for, besides these two kinds of beasts, all other beasts, fowls, birds, hawks, and other living things, are understood, *whereby the ownership or property* of the goods may be *known**. And this is agreeable to the charter of king Henry the Second, which includes every animal whatsoever. And the escape of a dog or cat, or other animal, is considered as a *medium of proof*, whereby the ownership or property of the goods may be known†. If this was a recent statute, it ought to be construed according to reason and justice. For, the court ought not, unless they are absolutely obliged to it, to construe an act of parliament directly contrary to the plain and clear principles of justice and humanity; which the construction urged on the part of the defendant in this case would undoubtedly be, in the highest degree. But this is a statute of very antient standing, and was declaratory of the common law, as appears from *Bracton*, who wrote before the making of it, and has been since sufficiently recognized; and no case produced to the contrary, nor any authority in point. The other two statutes

* 2 Inst. 167, 168.

† Ibid. 168.

are out of the case; they do not relate to *this* matter. Besides, here the defendant has insisted upon property. I am very clear that the direction was right, and that the rule for a new trial ought to be discharged."

All the other judges present concurred with his lordship; and, The rule to shew cause why there should not be a new trial was discharged.

The legal discussion of the several learned and intricate points in dispute between the College of Physicians and the Licentiates is thus introduced by sir James Burrow * :

"It would require a volume to give a full and particular *detail* of this long contest between the fellows and the licentiates; which was litigated with great spirit and eagerness between several very learned and respectable gentlemen of the faculty on both sides." It must not therefore be attempted within the compass of a collection of this nature. A summary account of it, however, ought not to be omitted; which was as follows :

"A rule had been obtained, upon the application of Dr. Letch, for the College of Physicians to shew cause why a Mandamus should not issue, directed to them, commanding them to admit John Letch, doctor of physic, to be a *member* of the college.

"This rule was made upon the whole body of the college or community of the faculty of physic of the city of London, and also upon the president and censors of the said college.

"On Thursday, 7 May, 1767, Mr. Yorke shewed cause against this rule; and sir Fletcher Norton argued in support of it.

"The short state of the material facts, with respect to this Mandamus, was, That Dr. Letch, who practised as a man-midwife, was summoned by the college, to be examined. He thereupon came in, and was examined thrice at the *Comitia minora*: and, after the third of those examinations, he was there balloted for, 'Whether he should be *approved of by them* or not?'

* From Easter Term 1768 to 6 June, 1771. The king against Dr. Afkew and others, censors of the College of Physicians, 4 Burr. 2186. continued down to 1771 inclusive.

A dispute arose upon this ballot. The *majority* of the number of balls *appeared* to be for approving him; but one of the censors declared, 'that he had by *mistake* put in his ball *for* approbation, which he meant and intended to be against *approving* him.' It was proposed 'to ballot over again;' but the president considered and declared this to be an approbation by a *majority of votes* on the ballot. On Dr. Letch's being proposed to the *Comitia majora*, nineteen to three of the members present were *against* putting the college-seal to his letters testimonial; and he was informed 'that he was *not elected*.'

"His counsel insisted, that, having been returned sufficient by the *Comitia minora*, he had thereby acquired an inchoate right to admission, which the court would enforce the completion of by *Mandamus*."

These few facts being premised; the author is desirous of proceeding to the speeches delivered by lord Mansfield in the several applications to the court between the years 1768 and 1771 inclusive. He humbly conceives, that greater erudition and penetration cannot easily be found than are discoverable in these speeches. The lord chief justice was successful in his arduous efforts to repress the zeal of the licentiates, on the one hand, by repeated defeats; and to moderate, on the other, by salutary and well-timed admonition, the triumphs of the college of physicians.

Lord *Mansfield* said, "He had no doubt what ought to be done; and therefore he would not keep the gentlemen of the faculty any longer in suspense.

"The counsel for the college have admitted the *jurisdiction of this court*; and they certainly have jurisdiction over corporate bodies, to see that they act agreeably to the end of their institution.

"There is no doubt, that where a party, who has a *right*, has *no other* specific legal remedy, the court will assist him by issuing this prerogative writ, in order to his obtaining such right *.

"There can be as little doubt, that the college are obliged, in conformity to the trust and confidence placed in them by the crown and the public, to *admit all* that are *fit*, and to *reject all* that are *unfit*; for, under the reason, and spirit, and true construction, of this charter and this act of parliament, *no*

* Vide 2 Burr. 1045, and 3 Burr. 1266, 1267, and 1659, 1660.

person ought to be *suffered to practise physic, but such only* as have skill and ability, and have diligently applied themselves to the study, and are well grounded in the knowledge, of it; and, on the other hand, *all* persons who *are so qualified*, and have bestowed their time, and money, and labour, in the proper studies that tend to such qualifications, have a right to be admitted to exercise and practise their profession. And the public have also a right to the assistance of such a person, who has by his labour and studies rendered himself capable of serving the publick by giving them proper advice and directions.

“It is true, that the judgement and discretion of *determining* upon this skill, ability, learning, and sufficiency to exercise and practise this profession, is trusted to the College of Physicians; and this court will not take it from them, nor interrupt them in the *due and proper* exercise of it. But their conduct in the exercise of this trust, thus committed to them, ought to be *fair, candid, and unprejudiced*; not *arbitrary, capricious, or biassed*, much less warped by *resentment or personal dislike*.

“Cases indeed *may* happen, where the rejection may be founded upon *other* grounds than insufficiency in point of skill and ability, or knowledge. It is possible that other causes of rejection may occur, as *badness of morals*, for instance.

“But, in the present case, they seem to have acted with candour and caution. Some of the gentlemen even make oath of their reasons against admitting this candidate for a licence. Objections to persons applying for licences to practise physic may be grounded on a variety of reasons; and the court are to judge of such objections and the reasons of them. If they are insufficient, the court may grant a Mandamus.

“If they should refuse to examine the candidate at all, the court would oblige them to do it. In a manuscript book of reports, which I have seen, the reporter cites, in reporting Dr. Bonham's case, a Mandamus in the time of Edward III. directed to the University of Oxford, commanding them to restore a man that was *bannitus*; which shews both the *antiquity* and *extent* of this remedy by Mandamus; but the court ought to be satisfied that they have *ground* to grant a Mandamus; it is *not* a writ that is to issue of *course*, or to be granted *merely for asking*.

“The question therefore is, ‘Whether here is a *proper* and *sufficient* ground for our granting a Mandamus?’

“Confi-

“Consider, then, what are the grounds of this application.

“First, Dr. Letch cannot dispute these bye-laws. This point is not open to him. For, *without them*, he has no ground to stand upon; he has never been examined by the body at large; therefore he is under a necessity, upon this application, of *allowing* the bye-laws to be good.

“The question then will be, ‘Whether the power is *devolved on the president and four censors*, or *remains with the body at large*?’

“I am clear, that the power *remains* with the *body*; and that the examination by the president and four censors is *only preparatory*, and for the ease of the body at large.

“There are various instances of *delegations* of a like kind. Bishops refer examinations of clergymen to their *chaplains*; so *universities* refer examinations to select parts of their bodies; but the *dernier determination* is in the body at large.

“*These censors*, to whom this examination is referred, take an *oath*, ‘not to approve of unfit persons, nor reject such as are fit.’

“The *usage* has been, to refer the examination of the person applying for a licence to the *Comitia minora*, as more easy, and more convenient to be executed by a small than by a large number of examiners; but *every fellow* has *notice* of it, and may examine and argue with the candidate, though he has no vote at these *Comitia minora*; so that every fellow has an opportunity of informing himself, and satisfying his own judgement concerning the sufficiency of the candidate. The *Comitia minora* have no power, upon their approbation, to *admit* the candidate; they have only power to approve. If they do approve, then the person so approved by them is to be afterwards proposed to the *Comitia majora* for election; and if, upon being so proposed, he shall be elected, *then* he is to be admitted.

“Supposing the *Comitia majora* to execute their power *corruptly*, taking this word in a large sense; and that they should refuse to admit a person who had been examined, approved, and regularly proposed to them, without being able to deny his fitness; this court ought indeed, in such a case, to interpose.

“But that is not pretended, or even hinted, to be the present case, with respect either to the *Comitia majora* or the *Comitia minora*.

“Dr. Letch charges them with nothing of this kind, nor with any thing to which it is requisite for them to give an answer: his counsel rely on the *usage*.

“The

“The question therefore is, ‘Whether the *Comitia majora* have acted corruptly?’

“Now, they have only referred him to a *second examination* in future; they have *not* absolutely *rejected* him.

“At the *Comitia minora*, there were three who, in truth, meant and intended to ballot against Dr. Letch, though one of them made a mistake and balloted for him, which mistake was declared and taken notice of at the very time; and it was proposed to ballot over again; and this was disclosed to the *Comitia majora*.

“This fact (of a mistake in the ballot for *approbation*) being disclosed to the *Comitia majora*; was it not extremely reasonable for them to refer the candidate to a *farther examination*? I see no injustice in this: the intention of the ballot was, that he should be *reported unfit*; and two of the censors now swear ‘that they *thought him so*.’

“I am satisfied that the *Comitia majora* had the power of rejecting him; and it does not by any means appear that they have acted upon improper grounds, or arbitrarily and capriciously.

“Here is *no ground* laid for demanding a Mandamus.”

His lordship concluded with a recommendation to the college, to settle all other matters *amongst themselves* without coming to this court; at the same time intimating to them a caution against *narrowing* their grounds of admission so much, that if even a *Boerhaave* should be resident here, he could not be admitted into their fellowship.

The rule was discharged, by the unanimous opinion of the court.

Two terms afterwards, *viz.* on Friday the 20th of November, 1767; Sir Fletcher Norton moved for a rule upon Dr. Askew and others (the four then censors), for them to shew cause why an information, in nature of a *Quo Warranto*, should not be granted against them, to shew by what authority they acted as censors of the College of Physicians.

The objection was, that whereas the election ought to be by the *whole* body, these gentlemen had been *elected* only by a *select* body; namely, by the fellows, *exclusive* of the licentiates; though the licentiates *demand* *admittance*, which was refused to them by the fellows, on pretence of their having no business there on that occasion.

It was argued on Thursday the 21st of April, 1768, by Sir Fletcher Norton and Mr. Morton, for the licentiates; and on Monday the 25th of April,

April, 1768, by Mr. Yorke (then attorney-general), Mr. Dunning (then solicitor-general), serjeant Davy, Mr. Ashurst, and Mr. Wallace, for the college; and Mr. Wedderburn, for the licentiates. On Wednesday, the 27th, serjeant Glynn, Mr. Walker, and Mr. Mansfield, proceeded on behalf of the licentiates; and on the same day the court gave their opinion.

Lord Mansfield took notice, "That the figure and consequence of the contending parties, and the respect due to them; the anxiety that has appeared in the contest, and perhaps the spirit which has been raised on both sides in the course of it, have carried the counsel concerned into a very great length of argument, and into the discussion of a variety of matter foreign to the point directly in question before the court upon the present motion.

"The question properly now before us is singly this, 'whether the persons applying for this information *are fellows, and intitled to vote in the election of censors?*' If they are, the election of these censors, being made in exclusion of their votes, is *not good*. If they are not fellows, and have no right to vote in the election of censors, then this election stands *unimpeached*.

"I consider the words '*socii, communitas, collegium, societas, collega, and fellows,*' as *synonymous* terms; and every *socius* or *collega*, as a *member* of the society, or corporation, or college. The question is, 'whether these *licentiates* are *socii*, or *collegæ*, or fellows?'

"The *facts* are not disputed; and there is no doubt about the *law*, as far as relates to the question now before us.

"Here is a *charter of incorporation*; and it has been admitted on both sides, that there has been a great number of *bye-laws* and *long usages*, which are agreed to appear upon their books and the extracts from them; and the permission of these licentiates *to practise* is not disputed.

"But I doubt whether *this permission to practise*, and these *letters testimonial*, can amount to an admission into the fellowship of the corporation or college.

"Nothing can make a man a fellow of the college without the *act of the college*. The first act to be done by them is their judging of the qualifications of the candidate. The admission into the fellowship is an act subsequent to that. The main end of the incorporation was to keep up the succession; and it was to be kept up by the admission of fellows after examination.

nation. The power of examining, and admitting after examination, was not an arbitrary power, but a *power coupled with a trust*. They are *bound* to admit every person whom, upon examination, they think to be *fit* to be admitted, within the description of the charter and the act of parliament which confirms it. The *person* who comes within that description has a *right* to be admitted into the fellowship. He has a claim to several exemptions, privileges, and advantages, attendant upon admission into the fellowship; and not only the candidate himself, if found fit, has a personal right; but the *public* has also a *right to his service*; and that not only as a physician, but as a *censor*, as an *elector*, as an *officer* in the offices to which he will, upon admission, become eligible. In Dr. Letch's case, the reasons for his rejection being called for; the answer was, 'that they judged him to be unfit;' and, as the legislature have vested the judgement in the *Comitia majora*; and there was no pretence or ground to pretend that they had acted corruptly, arbitrarily, or capriciously; that answer was esteemed a sufficient one; and they have power, not only by their charter, but by the law of the land, to make fit and reasonable laws, subject to certain qualifications.

"It appears, from the charter and the act of parliament, that the charter had an idea of persons who might practise physic in London, and yet *not* be fellows of the college. The president was to overlook *not only* the college, but also '*omnes homines ejusdem facultatis*'; so, when the college or corporation were to make bye-laws, these bye-laws were to relate *not only* to the fellows, but to *all others* practising physic within London or seven miles of it. The restraint from practising physic is thus expressed, '*nisi ad hoc admissus sit*' by letters testimonial under their common seal.' Now what does this '*ad hoc*' mean? It must mean, '*ad exercendum facultatem medicinæ admissus sit*'; and this is agreeable to the words used in 3 H. VIII. c. 11. concerning admissions by the bishop of London and dean of St. Paul's. The supervisal of the censors is expressed to include not only the physicians of London, but *omnes etiam qui per septem milliaria in circuitu ejusdem medicinam exercent*. The same observation holds as to punishments. This must regard those who had a right to practise in London and within seven miles of it, and were *not fellows* of the college.

"These observations convince me that the charter had an idea 'that *some persons might practise by licence* under their seal, who were *not fellows* of the college.

"Then

“ Then let us see how the usage was.

“ In 1555, they must have had a probationary licence, before admission into the college. Afterwards it was to be a probation for four years before admission. The college might grant such probationary licences with some reason, and agreeably to their institution. This shews that *some* licences were granted to persons *not* fellows of the college. The 3 H. VIII. c. 11. takes away all former privileges; and says, that no person within London, or seven miles of it, shall exercise as a physician, except he be first examined, approved, and admitted, by the bishop of London, or by the dean of St. Paul's, calling to them four doctors of physic; and the charter and statute confirming it have left every thing at large to the college, no way confined or restrained but by the fitness of the objects. In 1561, a *partial* licence was granted to an oculist; a person may be fit to practise in one branch who is not fit to practise in *another*. Licences have also been granted to *women*; and that may not be unreasonable in particular cases; as, for instance, such as Mrs. Stevens's medicine for the stone. *Partial* licences have been given for above 200 years. Of late years, indeed, *general* licences have been usual; and the persons applying for them have been examined, though not meant to be *members* of the corporation or college. In 1581, notice is taken of *three classes*, fellows, candidates, and licentiates; and from that time they have given licences to practise. The licences probably took their rise from that illegal bye-law (now at an end) which restrained the number of fellows to twenty. This was arbitrary and unjustifiable; they were obliged to admit all such as came within the terms of their charter; yet it is probable that the practice of licensing was in consequence of their having made it. However, for above 100 years, there has been a *known distinction* between *fellows* and *licentiates*; it is as well known as the distinction between graduates and under-graduates at the Universities.

“ This being premised, let us enquire ‘ who these gentlemen are that are now applying to the court.’

“ They are persons who set up a title directly contrary to the *sense* in which their licence is given *to* them, and received *by* them. They cannot avail themselves of their instrument in *this* way; it would be a *cheat* upon the college; and they have acquiesced many years under this licence given them by the college, as merely a licence *to practise*.

“ But even supposing them to have a right to be fellows; yet, as it is clear that the licence does *not* make them *ipso facto* fellows, they could not *vote in the election* of censors *before their admission* to the fellowship; and therefore the exclusion of their votes cannot impeach this election.

“ I am of opinion ‘ that this rule ought to be discharged.’

“ If my brothers should concur with me, the college, as now constituted, is at present to be considered as the body corporate. I have a great respect for this learned body; and, if they should think proper to hearken to my advice, I would wish them to consider whether this may not be a proper opportunity for them to review their statutes. And I would recommend it to them to take the best advice in doing it; and to attend to the design and intention of the crown and parliament in their institution. I see a source of great dispute and litigation in them as they now stand; there has not, as it should seem, been due consideration had of the charter, or legal advice taken in forming them.

“ The statute of 14 and 15 H. VIII. c. 5. after reciting the charter, mentions it to be expedient and necessary to provide, ‘ that no person of the said politic body and commonalty aforesaid be suffered to exercise and practise physic, but only those persons that be profound, sad, and discreet, groundedly learned, and deeply studied in physic.’

“ I do not say, that *no* man can be a licentiate, who is not perfectly and completely qualified to be a *fellow* of the college. Many persons of no great skill or eminence have been licensed; and there seem to be fewer checks, guards, and restrictions, upon granting licences, than upon the choice of fellows. Yet it has been said, ‘ that there are many among the licentiates, who would do honor to the college, or any society of which they should be members, by their skill and learning, as well as other valuable and amiable qualities; and that the college themselves, as well as every body else, are sensible that is in fact true and undeniable.’ If this be so, how can any bye-laws, which *exclude the possibility* of admitting *such* persons into the college, stand with the trust *reposed in them*, ‘ of admitting *all that are fit*?’ If their bye-laws interfere with their exercising their own judgement, or prevent them from receiving into their body persons known or thought by them to be really fit and qualified; such bye-laws require regulations. Such of them, indeed, as only require a proper education, and a sufficient degree of skill and qualification, may be still retained. There can be no objection.

objection to cautions of this sort; and the rather, if it be true, 'that there are some amongst the licentiates, unfit to be received into any society.' It is a breach of trust in the college, to license persons altogether unfit.

"I do not choose to speak more *particularly*; but I recommend it to those who are now likely to be established the masters of the college, to take good advice upon the points I have been hinting to them.

"The court were unanimous in discharging the rule.

"On Thursday the 17th of November, 1768, Sir Fletcher Norton and Mr. Morton moved the court on behalf of Dr. Edward Archer, and Mr. Walker on behalf of Dr. Fothergill, for writs of *Mandamus*, to oblige the college to admit these two licentiates; with an intention to try the question, 'whether the licentiates had a right to be admitted fellows;' and that litigation lasted till the 6th of June, 1771; but they only came round to the same point which had been already determined as above. For these two gentlemen had accepted licences under the bye-law of 1737; and the court were of opinion, 'that they ought not afterwards to desert it, and treat it as null and void, and set up a right of admission under the charter, upon the foundation of this very licence which they had *accepted under the bye-law*, upon a supposition that the bye-law was a bad one;' so that the return was allowed, upon *that* objection to their claim; and the intended question remained unsettled.

"Lord Mansfield renewed his former hint, by saying, 'the college will now consider, whether they will trust to a return upon *these* bye-laws; or *mend* them.'

Sir James Burrow adds,

"I am informed that they have done the latter."

In 1771*, the dispute between the college of physicians and the licentiates was again revived; and the *vexata questio*, "Whether the latter had a right to be fellows or members of the faculty of

* 5 Burr. 2740.

phyfic," was resumed, argued, and re-argued, with unabated eagerness and spirit on both sides.

Dr. Fothergill's case stood in the Crown Paper of Saturday the 21st of April, 1771; and was then argued by serjeant Glynn for the doctor, and serjeant Davy for the college. It was not then determined, nor did the court declare any opinion: indeed, they strongly recommended an agreement between the very respectable persons concerned in this dispute. But those gentlemen not shewing any great inclination to a compromise, it stood for further argument: and it was now a second time argued, by Mr. Morton for the doctor, and Mr. Wallace for the college. It would be too tedious to specify the arguments at large. But, as they all arose out of the new *mandamus* and the return to it, the stating of the writ and return (with exactness and precision) will, as Sir James Burrow observes, convey to the reader a complete idea of the nature of the licentiates' claim, and the college's defence, and of the whole constitution of this learned faculty; and will enable him to judge for himself, what were the proper arguments to be drawn therefrom; as well as explain to him the reason upon which the court rejected the claim of the licentiates "to be admitted members of the corporation."

The author of these sheets begs leave to refer the jurisperit to the long and correct report of the legal proceedings in general, and particularly the writ and return of it in 5 Burr. 2743. The very attentive consideration which lord Mansfield gave this important business cannot be analysed or abbreviated without manifest injustice to his speeches; and the reader will, it is to be hoped, accept of this apology for the length of them.

Lord *Mansfield* said, "He had foreseen the labyrinth * and maze of litigation that this learned body would be involved in, by persisting rigidly on both

* Vide 5 Burr. 2759.

sides in pursuing the points of their dispute, and contesting about a feather. He said, he read over all their constitutions, statutes, and bye-laws: and he intimated, that many of them are narrow, if not illegal.

“ This matter came on, before, upon a title not set out in the writ. A title is now set out; which title is a licence from the college, after having been duly examined and approved, ‘to exercise the faculty of physick in the city of London, and for seven miles round the same.’ If that alone makes him *ipso facto* a fellow of the college, there is no need of admission. The return admits the four acts of parliament stated in the writ, and also admits the licence: but they deny it to be a consequence, ‘that *by reason of the premisses* he became lawfully intitled to be admitted a *member* of the said college, and commonalty, and corporation, as by the writ is supposed.’ Then they set forth the usage ever since the making of the acts of parliament; that every person admitted a member must be, before his being admitted a member, *elect*ed to it by the president and college; and that the doctor had never been so elected. Then they set forth the bye-law * to the same effect; and that he has not been elected a member according to that bye-law. They then set forth another bye-law †, which divides the faculty into three classes, viz: *members* of the college; *candidates* for election into such membership (who were to be examined and approved of by the president and censors to be candidates for election); and *licentiates*, or *permissi*. They set forth another bye-law ‡, that nobody should be admitted into the society of the college, who should not first have been of the number of candidates for one whole year, or publicly read physick for three years in some university of *Britain*; or been doctor of the chair in some University of this kingdom, or ordinary King’s physician. They set forth another bye-law §, that nobody should be admitted into the order of fellows, who should not have been a candidate for one whole year; except the King or Queen’s ordinary physician with salary, or royal professor of physick in *Oxford* or *Cambridge*.

They aver that the doctor never was a candidate for one whole year, or any other time; and that he did not come within any of the exceptions in these two last mentioned bye-laws. Then they set forth a fifth bye-law (made

* Feb. 1, 1555.

† Feb. 1, 1572.

‡ April 4, 1737.

§ April 1, 1765.

at the same * time with the third), whereby, reciting 'that many practised physick in the city of *London*, whom the president and college, or commonalty, deemed altogether unfit to be adepth into the number of fellows or candidates, either because they were not *Britons* by birth, or had not taken the degree of a doctor, or were not sufficiently learned, or sufficiently advanced in age and gravity, or for other like causes, and yet might be able to serve the public, and do good to men's healths, at least in some cures;' it was ordained, that, after due examination and approbation of the president and censors, such persons should be *permitted to practise*, so long as they behaved themselves well. That many persons from time to time applied to be, and according to, and in pursuance of this last bye-law, were, examined, and approved by the president and censors for the time being, and licensed and admitted to exercise the faculty of physick in the city of *London*, and within seven miles round the same: and have been and are called and known by the name of *licentiates*. They add further, that *Dr. Fothergill* applied to the president and college, to be by them licensed and admitted to exercise the faculty of physick in the city of *London*, and within seven miles round the same; and that he was *thereupon, according to, and in pursuance* of the last mentioned bye-law, examined and approved by the president and censors, and was licensed and admitted by the president and censors, *according* to the said last-mentioned bye-law, to exercise the faculty of physick in the city of *London* and for seven miles round it. And they aver *this* to be the examination, approbation, and admission of him, in the writ mentioned: and that he never was examined, approved, or admitted, to exercise the faculty of physick in the city of *London* and within seven miles round the same, in any other manner, or for any other purpose, than as and in order to his being a licentiate as aforesaid. Now, be this bye-law good or bad, yet the right of admission into the college is claimed *under* it. It would be a most unreasonable thing, to accept this licence *under* the bye-laws, and yet to treat these bye-laws as null and void; and to turn this licence so accepted against the persons from whom it was thus accepted, and to set it up as the foundation of a right to be admitted under the charter. Therefore, as no other foundation of such right to be a fellow is shewn, it comes round to the very

* April 4, 1737.

point

point upon which our former determination turned: and I am of opinion that the return ought to be allowed.

“By the court unanimously, Let the return be allowed.”

Lord Mansfield renewed the hint to the college, whether they would think it adviseable to trust to a return upon their present bye-laws; or whether they would not consider about mending them.

And sir James Burrow adds, “I have been told, that they have since mended them.”

The jurisprudent will find much analytical reasoning and deep learning on the doctrine of mutual debts, and a lien on goods in particular cases towards satisfaction thereof, in a case reserved for the opinion of the court at a trial * at *Nisi prius* at Guildhall, before lord Mansfield; which case was, at the desire of the parties, twice argued.

Lord Mansfield, in delivering the opinion of the court, observed, among other things:

“That the general question is, “Whether the plaintiffs in this action should be obliged to do justice to the defendants, by paying what is *due* to them, before they are intitled to demand the goods from them; and to recover their value, in case of refusal.”

“*Natural equity* says, that cross demands should compensate each other by deducting the less sum from the greater; and that the *difference* is the only sum which can be *justly* due.

“But *positive law*, for the sake of the forms of proceeding and convenience of trial, has said that each must sue and recover separately, in *separate actions*.

“It may give light to this case, and the authorities cited, if I trace the law relative to the doing complete justice in the *same* suit, or turning the defendant round to *another* suit, which, under various circumstances, may be of no avail.

* Green and another against Farmer and another. 4 Burr. 2214.

“ Where the nature of the employment, transaction, or dealings, necessarily constitutes an account consisting of receipts and payments, debts and credits; it is certain that only the *balance* can be the debt: and by the proper forms of proceeding in courts of law or equity, the balance only can be recovered.

“ After a judgement, or decree, ‘to account,’ both parties are equally actors.

“ Where there were *mutual debts unconnected*, the law has said they should not be set off; but each must sue. And courts of equity followed the same rule, because it was the law; for, had they done otherwise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this, in the case of *Bankrupts*: and it was provided for by 4th Anne, c. 17. § 11. and 5 Geo. II. c. 30. § 28 *. This clause must have, every where, the *same* construction and effect; whether the question arises upon a summary petition, or a formal bill, or an action at law. There can be but one right construction: and therefore, if courts differ, one must be wrong.

Where there was *no* bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring, that parliament interposed by 2 Geo. II. †. and 8 Geo. II. c. 24. § 5. But the provision does not go to *goods*, or other *specific* things, wrongfully detained: and therefore neither courts of law nor equity can make the plaintiff who sues for such goods pay first what is due to the defendant, except so far as the goods can be construed a *pledge*; and then the right of the plaintiff is only to *redeem*.

The convenience of commerce, and natural justice, are on the side of liens: and therefore of late years, courts lean that way. 1st, Where there is an *express contract*; 2dly, Where it is *implied* from the usage of trade; or, 3dly, From the manner of dealing between the parties in the particular case; 4thly, Or where the defendant has acted as a *factor*.

The case *ex parte Ockenden* was well considered. Lord Hardwicke’s bias was strong on behalf of liens: and his own determination in that case *ex parte Deeze* had been almost in point: yet he took time to consider it and

* Directing mutual demands to be balanced.

† Sect. 13. for setting off mutual debts against each other.

search for precedents. And, after consideration, he thought he could not construe it within the mutual-credit clause of the bankrupt-act; *unless* it could be so construed in an action of *trover* (and that is certainly so). He rested upon there being *no* room, in that case, to *imply* a lien from usage of trade, or from the particular manner of dealing. This case, and that *ex parte Deeze*, are well reported in the printed books: but I will read you my note of both. (Accordingly, he read his own note of the case.) This was in *August*, 1754; and it stood over: and on the 20th of *December*, 1754, no precedents being found, he determined accordingly; and no precedents are cited *since* the 20th of *December*, 1754. Then his lordship read his own note *ex parte Deeze*, on the bankruptcy of Norton Nicholls, “That the assignees could not take the goods from the petitioner without making satisfaction for the whole of his debt. As to a lien in that case, from the nature and course of dealing, the evidence is not clear.” The opinion was, ‘that the petitioner should be paid his debt, before the goods were taken out of his hands.’

“Though lord Hardwicke took notice of the evidence of usage, he said it was not very clear. He thought it hard that mutual credit should only relate to pecuniary demands; though goods can only be paid for in money: and, in that case, there was an account between the parties; wine on one side, and package on the other. I have enquired into the case *ex parte Deeze*, and the affidavit of the book-keeper (which he particularly stated). If the usage there stated be true, the packer was in the nature of a *factor*; and, *as such*, had a lien for the general balance. It was settled in 1755, ‘that a packer, being in the nature of a factor, would be intitled to a lien.’ Apply this to the case *ex parte Ockenden*, and to the present case. In this case, the defendant acts in *no* respect as a *factor*; but merely as a *manufacturer*, to dye. There is no *express contract* ‘to pledge;’ *no usage* of trade; *no* argument from their *particular dealing*: on the contrary, it appears that he trusted to Messrs. *Heinzleman’s* *personal* credit only. The defendants never detained any goods to answer their debt; but, from the 1st of *January* to the 10th of *June*, gave all back; for the dying of which they now claim to detain; without having any new cloths sent in. After notice of the failure of *Heinzleman*, they delivered eleven pieces to Aston and Hodgson, without a claim.

“It is sufficient, that *no contract* can be *implied*, to give a lien for the balance, from any usage of trade or manner of dealing: but it is much stronger, when the *manner of dealing* shews the contrary, and that the defen-

dants relied on *personal credit only*. Therefore we are all of opinion, ' that there is *no lien* here, beyond that which is given by the general rule of law: which never was disputed."

University of Cambridge.

Rex *versus* Agar et O'Meara *.

On the first day of Hilary Term Mr. Wallace moved for a rule upon the prosecutor, to shew cause why conusance should not be allowed to the University of Cambridge. He had in court the warrant of attorney, the claim of conusance, the charter, and the act of parliament.

The court gave him the following rule:

" Upon reading the warrant of attorney of the chancellor, masters, and scholars of the University of Cambridge, and the claim of conuzance of the indictment against the defendants in this cause; and the proceedings thereon by the said chancellor, masters, and scholars of the said University enrolled in this court; and the exemplification of the letters patent and act of parliament in the said claim mentioned; and also the certificate of the said chancellor, master, and scholars, and the affidavit of the said defendants; it is ordered, that Wednesday next be given to the prosecutor to shew cause why the said claim of conusance by the said chancellor, masters, and scholars, should not be allowed; upon notice of this rule, to be given to the prosecutor in the mean time."

The indictment was found at the quarter sessions at Cambridge, holden on April 12, 1771. It was for an assault and battery, committed upon the 18th of March preceding, by the defendants, Agar and O'Meara, upon Thomas Fletcher, the University printer, at a public coffee-house in Cambridge.

* Monday, February 3, 1772.

Lord Mansfield delivered the opinion of the court.

“Taking it at present for granted, that this claim ought to be ‘allowed, if made in due time and in proper manner;’ it will be proper first to consider the objection as to its not being made in *due time*.

“The established rule of law is, ‘that conusance must be claimed in the *first* instance, or at the *first* day.’ And this must be admitted to be a very proper and reasonable rule; for, if there were not *some restriction* as to the time of claiming conusance, inconvenience would ensue. If the claimant was permitted to come at *any* time, he might suffer the cause to be almost gone through before he made his claim, which would be an apparent prejudice to suitors; therefore, if you will interrupt the ordinary course of justice, you ought to stop the plaintiff or prosecutor in the first instance.

“Though all the antient resolutions concur in this opinion, yet there has been variety of opinions ‘what should or should not be *accounted* a coming in the first instance within the rule.’ And this notion ‘of coming in the first instance,’ which some had said must be ‘the *first* day,’ others ‘that it must be *every* day,’ is to be expounded, according to the authorities, by the true meaning and reason of the rule, and not in every case to be strictly confined to the same point of time. For instance, the *return of the original writ*, in *trespass*, where *place is named*, or *præcipe quod reddat*, where *land is demanded*, may be the *first instance*, because, in these cases, the writ tells where the cause of action arises. But in debt or detinue it is otherwise; for, it is *not known* where the contract or obligation was made; and therefore, till the plaintiff has *counted*, the claim needs not to be made. So in *replevin*, the place where the cattle were taken does not appear, till the plaintiff has counted, if it be between strangers; but if a replevin is sued against the lord of the franchise himself, there the lord’s claim would come too late *after* the count, because the law intends that he *knew* where the taking was made, being himself a party; and so, by not demanding his privilege on the writ, he gave the court seisin of the cause; for the lord must use no delay.

From these authorities two conclusions follow, and these two propositions may be laid down. First, that before any person is bound to claim conusance, he is intended by law to have had some *legal notice* of his franchise being intrenched upon; and therefore it is said to be named *conusance*. Secondly, that, in order to bar him from making the claim, there ought to

be some *laches*, or *default*, in him, and a time shewn when he might have claimed it sooner after such legal notice.

“The court are now to judge upon this claim, and the certificates and affidavits.

“Let us see then, from the facts appearing to the court, whether a time is shewn when the law will intend that they had conusance of the matter being within their franchise, and whether any default has been made, and time lapsed when the claim might have been sooner preferred; and whether the court was become fully seised of the cause at the time when the claim was actually made.

“The facts are these: The assault is sworn to have been committed on the 18th of March last, at a public coffee-house in Cambridge; and it is so laid in the indictment. The indictment was preferred, and found on the 12th of April. The defendant O'Meara was matriculated on that day. It is not material, on the present question, whether it was before or after the bill was preferred. Both defendants appeared at the sessions, in pursuance of a recognizance entered into by them for that purpose before a justice of the peace of the town and county, to answer for that assault; but they did not plead. Between that April sessions and the following Midsummer sessions, a warrant is obtained from me, against the defendants, upon the usual certificate of ‘an indictment being found, and that the defendants had not pleaded.’ The defendants thereupon entered into a second recognizance with fresh sureties ‘to appear and plead at the next quarter-sessions.’ The defendants sued out a *Certiorari*, tested the 19th of June, the last day of Trinity Term, returnable on the Morrow of All Souls, to remove the indictment, and entered into the usual recognizance ‘to plead to it, and try it at the next assizes for the county of Cambridge.’ The defendants appeared at the Midsummer sessions; and, before they made use of their writ of *Certiorari*, moved, by their counsel, to stay proceedings on the indictment, alleging, ‘that the University of Cambridge had conusance of it.’ Their motion was refused; and then they produce the *Certiorari*. Upon the 5th of November, the warrant of attorney is made ‘to claim conusance.’ Upon the 6th the conusance is claimed; and which is by the claim alleged to be on the Morrow of All Souls.

“Here, then, is ‘*legal notice*’ that the offence was committed, ‘and prosecuted too within their franchise on the 12th of April;’ for, it so appears upon the face of the record, and therefore it is as strong as where the law in-

intends notice from the writ, where the cause of action arises in the cases alluded to.

The proceedings upon this indictment have been in the usual course, in a Court of Record within the franchise: and the defendants were bound to appear, and answer to the indictment (if found against them) at the *April* sessions. But it is not necessary to determine, 'that the claim should have been made then:' for, they were bound by the second recognizance, 'to appear and plead at the *Midsummer* sessions;' and they did then appear, and made an ineffectual effort to take advantage of the claim of the university against the jurisdiction of the sessions.

Here then is a time shewn when the Chancellor, Masters, and Scholars of the university, might have made their claim. And there is no pretence to say that the prosecutor did any act to prejudice the lords of the franchise, or oust them of it collusively, or use any artifice to prevent their making their claim in due time. But they came *too late*. They did not use the writ of *Certiorari* till *after* their motion upon the claim had been heard and denied: and when the claim was in fact made here, the court were in *full possession* of the cause, upon the writ of *certiorari*, which was returnable upon the *Morrow of All Souls*.

The claim must be disallowed, and the rule discharged.

The great importance of the cause of *Morgan versus Jones*, the interesting circumstance of a correct transcript of the Lord Chief Justice's speech on that important occasion not having hitherto appeared in print, and the endearing evidence of his lordship's unremitted attention to the barristers and students, in stating the case with brevity, yet with great precision, and without the omission of any one material fact, limitation, or power—these concurrent circumstances are the best apology which the author can make (who had the honor of being employed as counsel in the cause) for the insertion of the following legal speech, replete with sound reasoning, though destitute in a great degree of ornaments of style, or of the power to attract the attention of readers of every denomination.

Lord

Lord *Mansfield*. “ Sir William Morgan, at the time of making his will in 1731, was seised in fee of several lands in the counties of Monmouth and Glamorgan, which he had purchased after his marriage, and likewise of an equity of redemption of estates subject to a mortgage; and he was seised in fee of several lands in the county of Brecon; besides that, he was seised of his great family estate in the counties of Monmouth and Glamorgan, subject to the uses of his marriage settlement; and the uses of his marriage settlement, as far as are at all material to the present question, were in the usual way; the estate was settled to him for life, then subject to a jointure by way of rent-charge to Lady Rachel, and the first and every other son of that marriage; that is, of him by Lady Rachel, in tail male reversion to him in fee. Then there are terms created for the purposes of raising portions for younger children upon the two usual events of there being and not being a son, (the two usual events guarded against). These were the uses of the marriage settlement, at least all of them that are material to be stated. It appears that he was then in a very bad state of health; for, by comparing the dates as stated in the case, the will bears date but about three weeks before his death; and the state of his family was, that his lady was then alive; he had two sons by her and two daughters; and under these circumstances he made his will; and as I have stated the two kinds of estates that he had, that is, a reversion in fee, subject to the uses of his marriage settlement, and likewise that which he could dispose of, he makes different provisions with regard to these two estates; for, seeing that his eldest son had a great estate secured to him by the marriage settlement, with regard to all the other lands of which he was seised in fee, purchased after his marriage, either in Monmouth, or in Glamorgan, or in the county of Brecon, he gives them to the duke of Devonshire and other relations of his wife's family, on trust to pay his debts, and then he gives them to his second son Edward in strict settlement, with remainder over to his son William and the heirs male of his body, with all the usual words of seniority of age and priority of birth; and for default of such issue, ‘ to the use and behoof of such other son of mine lawfully begotten, as shall or may hereafter be born, for his life.’ Then to his first and every other son in tail male, exactly in the same manner in which it is given to Edward and William, he makes the after-born son a tenant for life in the same manner as he first made Edward, and then William, upon failure of him, and the issue male of his body; then he de-
vices

wifes to Thomas, his brother, for life, in strict settlement, over to the heirs male of his body. This is the disposition of all the lands whereof he was seised in fee, and could absolutely dispose of in possession. Now the next disposition, which gave rise to the following question, regards the settled estate; and the very particular words and meaning of the context, with the real circumstances of the family, are very material to be taken into consideration and understood; and it is for that reason, and for the *sake of the bar*, and *the students*, that I state so much of the case. ‘And for as much as it is my will, intent, and meaning, that in case my said two sons now living, or any other son or sons of mine lawfully begotten, or hereafter to be born, should die without issue male of their bodies, or of the body of some or one of them lawfully to be begotten after their respective decease without issue male, as aforesaid (which ‘*as aforesaid*,’ has a reference to the devise, that he makes of his own estate, for there is no ‘*as aforesaid*’ connected to the settled estate); ‘that then, all and singular my messuages, manors, royalties, advowsons, parks, lands, tenements, and hereditaments whatsoever and wheresoever, with their and every of their appurtenances, situate, lying, and being within the several counties of Monmouth and Glamorgan, and not hereinbefore devised, shall be *devised* and settled to and for the several uses, intents, and purposes, hereinafter mentioned, expressed, limited, and declared. It is therefore my will, intent, and meaning, that in case my said sons William Morgan and Edward Morgan, or any other son or sons of mine hereafter to be born as aforesaid, shall happen to die respectively without any issue male of their bodies, or of the body of some or one of them, as aforesaid; and in such case, if it shall so happen, then I give and devise the *remainder* (the expression is remarkable and material to the argument)—I give and devise the *remainder* of all and singular my messuages, manors, royalties, advowsons, parks, lands, tenements, and hereditaments whatsoever and wheresoever, with their and every of their appurtenances, situate, lying, and being within the counties of Monmouth and Glamorgan, and not herein and hereby before devised, and all the reversions, to my said brother Thomas Morgan; and he gives it to him in strict settlement, for and during the term of his natural life, without impeachment of waste, subject to all the provisions, clauses, &c. contained in his marriage settlement; and then ‘there is a limitation over to the first and every other son of his brother Thomas Morgan.’ The event that happened was, fir

William

William died soon after; lady Rachel is still alive; his son Edward died first, without issue; his son William died without issue; Thomas took possession of the estate upon the death of the survivor of the two sons of sir William; he is dead. Upon his death the estate is come to Charles, who is now in possession. A question is started on the part of the daughter of sir William, that the devise to Thomas, the brother, of all the lands that were contained in the marriage-settlement, is void, as too remote. But, before I come to the question, there is another part of the will that I ought to state to you; because, in one light, as it struck me first, it is very material to the argument, and I do not know but it is still, though, after I had mentioned it to the counsel, it struck me that it was not of the force it had first appeared to me; that is, the *powers*; for, after disposing of both estates, then follow these powers; and, if they clearly relate to the whole, if they clearly relate to the settled estate, they have vast weight in the determination. It may be answered, by saying, they relate to that estate that he had power to devise; but there are no words that tie it up so. The words are these, 'Provided always, and my will and meaning is, that it shall be lawful for my eldest son William at any time during his life, and likewise to my son Edward at any time during his life, and to any after-born son during his life, to make (I do not state technical terms) 'a jointure upon his wife by deed, to grant portions to a younger child or children, and to make leases, with qualifications or restrictions to those leases; and then it follows, upon a proviso, that his son Edward, notwithstanding what he had devised to him, should, over and above that, be entitled to the provision that was created for him, and the benefit of the younger children's portions; and that he should have the full benefit of all the marriage-settlement as a younger child, notwithstanding all the provision made for him by the will; and then comes the power to Thomas Morgan, the son of Thomas Morgan, by virtue of the limitations hereinbefore mentioned, to grant any lease, or grant under their or either of their hands and seals the premises, or any part or parcels. Now, you observe, that the reversion of the settled estate is limited to Thomas, the brother, for life; so that he had no estate under the will, either in the lands that belonged to the testator absolutely, or in the reversion of the fee simple estate; that sir William had but what is limited to him in strict settlement, and that is a material argument to construe the powers as extending to all the land; for, this power of leasing given to the brother and his son

must

must certainly be meant to extend to all the land. Now this is the state, situation, and circumstances of the family, under which the will was made. And the question that is stated is, whether the limitation over, of all the lands comprised in the settlement, is not void? If it is void, why then it descends to sir William's heir at law, and that is his daughter; for, sir William had in him the reversion in fee; and the reason upon which it is contended that it is void is this, that the construction must be, that it is an executory devise to the brother, after the failure of issue male of sir William's then marriage, and a failure of issue male of any subsequent marriage; and that, with regard to any subsequent marriage, no estate being limited to the issue male of that marriage, the construction is, that they were to take nothing at all under the will; that the fee simple would descend to them, and, letting the fee simple descend, it is as if he had said to them and their heirs; that would not have done, for there the limitation would have restrained it, but that he meant the issue male of a subsequent marriage should take a fee simple estate, and that the limitations he gives to his brother Thomas, allowing them to take a fee simple estate, was a fee upon a fee, which can only be supported within terms which the law has laid down to prevent perpetuity, and therefore cannot take effect after an indefinite failure of issue. That is the whole ground upon which the question turns; and what is to be determined is, whether that is the true construction of the will. Now, it has been truly said that to construe a will, the intent of the testator is to be taken from the whole will together, applied to the subject-matter to which the will relates; if that be agreeable to law, it must govern; if the intent is clear, but not agreeable to law, it is void and null; if the intent is clear and agreeable to law, no matter what words the testator has made use of; the courts of justice where the questions arise, must adapt and model his clear intent in such manner as he himself might have done, if he had made use of apt and legal terms. Another thing that has been said, and it is unfortunate when words happen to be made use of in the determination of causes without a precise, clear, definite idea annexed to them; for, the great disputes of the world arise upon words; a great dispute has been made of what is necessary implication, and that a necessary implication must mean that, when there is a natural impossibility that it should be otherwise. There never was such a construction put upon it. What is a necessary implication?—It is that implication which arises upon the words the testator has made use of that clearly satisfies the court what was his meaning; and that

is put in opposition to a conjecture; you are not to conjecture what would have been the testator's meaning if he had had the whole case before him, and if he had thought of such an event what the testator would have said upon it. That is a conjecture; you must find out his meaning, whether expressed or implied, from his words; and if it is an express meaning and he has made use of inaccurate words, you must construe his words, if they are words of sense, or declarations which are no way accurate in legal phrase. You must see clearly that it is the testator's meaning; and, if the testator's meaning is doubtful, if a court of justice cannot say they are satisfied his intention was so, the whole will be void for uncertainty. Therefore necessary implication is that which leaves no room to doubt. It is not an implication upon conjecture; you are not to conjecture what he would have done in an event he never thought of; that will not do; and many cases have been determined upon that event; one I mentioned, the great case of Coryton and Hellier, in 1745, determined by lord Hardwick; where a man by his will meaning to make a marriage-settlement devises to A. and to prevent the entail being barred, having no freehold he devises to A. for 99 years, and then goes on to make the usual settlement, and the drawer omitted to say for 99 years if he should so long live; the great question there was, whether by implication the words 'if he should so long live' should be added. It was not a necessary implication, it was not impossible that he meant a term of 99 years; but there lord Hardwick, upon going through all the arguments and the nature of the thing, was convinced, and every body else, equal to a demonstration, that the testator meant 99 years if he should so long live, and not a term of 99 years; and so that case was adjudged. There is no doubt the testator did mean that, and that is a very strong fact; for, it is adding words the testator had not made use of to the limitation which stood of itself. And therefore the grand question is, as has been truly stated, to find out from all the will taken together, what was the testator's real intention; and upon the last argument, as I have taken a note of it, Mr. Serjeant Hill set out by saying, "In this case there can be no doubt of the testator's intention. The testator's intention is most clear; but his intention cannot take effect, because he has not done it according to law, he has limited it upon a contingency which makes it void in point of law." When the testator's intention is admitted to be clear, it goes a great way in the determination of the question; especially, when the counsel that argue on the other side are forced to admit that it is clear; and Mr. Mansfield to-day has made no doubt whatever as to the

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the intention, and indeed it is impossible to make a doubt on that head. Sir William Morgan, a gentleman of a Welch family, an ancient family I believe, having a great family-estate, having wherewithal to provide most amply for a daughter, has a mind the family-estate shall go on in the family as long as it can in the male line. Why then, having the estate settled upon the issue male of his present family, he makes a provision for the reversion in fee. What was his meaning? It was this—if there was a failure of issue male of his own body, it should go to his brother: that is clear, if he meant that his brother should take by way of executory devise, and that he should prevent the devise from being barred during that time. Why then his intention is contrary to law, and shall not take effect; but if he clearly meant this, ‘that my issue male shall take successively,’ and when there is a failure of my issue male, if it goes to the children of a subsequent marriage, or if, not thinking of a subsequent marriage, he meant to say, in case Lady Rachel survives me, and, in case there is no issue male of my marriage, I give it to my brother, in either of these cases it is an intent that according to law must be effectuated; and, if it can, the court ought to do it; now, no man can doubt but that was his intent, that his estate should go to his own issue male, and, failing in that, should go to his brother; there is no person who reads the will but must be clear that was his intent; and it is as clear that neither he nor the drawer of the will ever thought of an executory devise. Then how may this be effectuated? I think it may, very clearly, by the construction of the testator’s intent, one or two ways; and it is quite indifferent, as the event has happened, which way it is construed; the arguments to both conclude for each of them: from the intention it cannot be otherwise; for, if the testator has said, whereas my estate is settled upon my first and every other son in tail male by my marriage-settlement, therefore in case they all die without heirs male of their body I give it to my brother; if he had said so in express words, which would have given the reversion in fee, and if he had lived years after the death of his wife, had married another wife, and had had sons of that marriage, and had not made any settlement, and had not revoked the will, notwithstanding he had said it so expressly, the intent being so plain that his brother was only to take upon failure of his own issue male, that if he had not had that contingency in view, Mr. Dunning has said truly, that such second marriage &c. as above stated would have been a revocation of his will; and that point is now settled with regard to real estates, as it had been before of personal estates. It was settled by three of the judges

and afterwards confirmed by that case Mr. Dunning alludes to; and very rightly determined; for, it is impossible that a batchelor having made a will and having no family, but afterwards marrying and having children of that marriage, though by negligence or forgetfulness, or some accident or other, he had not cancelled that will, that he meant that will should stand upon a supposition of having no children and no family; the very presumption would have been that the devise over to his brother was not intended, if he had had issue by a second marriage. The second way by which the intention of the testator may be effectuated here is, that which I very believe in my own mind was the true case, that neither sir William, nor any body concerned for him, at that time had an idea of making the least provision for, or having the least view to the contingency of, a second marriage. The whole will, goes upon the supposition of the children of that marriage surviving him, made in his sickness, made but three weeks before his death. Every part shews that there is a provision in it, that his son Edward shall have the benefit of his marriage-settlement; there is a provision in it appointing his wife, Lady Rachel, one of the guardians of his children, and one of the executors: he made a full disposition of all the estate that he was seised in fee of. Then what was immediately his object?—Why, his settlement. For, there is a distinction between the two sorts of his estate, a plain distinction taken up by him, having disposed of all the estate he was seised in fee of; then as to the other he comes by way of recital; he does not dispose of that immediately, but says, my mind is, that if my son or sons now living, or any after-sons, shall happen to die without issue male, that it is my intent, in case the succession opens, in case the event shall happen in which the estate is to be enjoyed by another, what is the case?—Why in case issue male of the marriage fail, for if that should continue he had nothing but a reversion in fee, any after-born son (he has not said of Lady Rachel, but that was plainly his intention) should take. All the arguments on this part of the case will easily go to the second light in which it is to be considered, to effectuate his intention. What is he to give in case that event shall happen?—Not the lands, for, says he, I have nothing but the remainder in fee; I give the *remainder* in fee; that is very remarkable, for the remainder is to denote the quality of the estate he is to give, since he has all the conveyancers, words, to give the lands, messuages, manors, royalties, advowsons, parks, &c.; then he follows them with the words reversion and reversions, remainder and remainders; but he recites it with his intent

applied.

applied to the limitations in being ; my intent is, that, in case my issue male fail, the *remainder* shall go another way : what remainder ?—the remainder after the estate tail. So it is very strong and clear to conviction that he really meant to make a devise only, provided he died without any subsequent marriage ; and that the only limitations that could take effect before this remainder was to operate, were the limitations created by the marriage-settlement, but not to rest upon that, as the words are, to be sure, after-born sons, without saying by lady Rachel or upon her body begotten ; let us suppose that he meant after-born by any other marriage ; and, in case the point of revocation had been doubtful, and Sir William had married a second wife, left a son by that second wife ; and a question had arisen between the brother and the son, whether that son was disinherited or not, by that devise. In case there was a doubt on the point of revocation, to be sure the court, from the intention of the testator, would have leaned very strongly to effectuate his real intention, which certainly was not to disinherit any issue of his own body—why then suppose it to have that extensive meaning, what would be the consequence to give it effect ? why that every son to be born of a subsequent marriage is, by the necessary declaration of the testator, to have an estate-tail ; and, it is not necessary for a testator to give his own son and heir an estate, it is sufficient that his intent appears to restrain from what would be made void by the operation of law. Suppose he said, I charge my estate with so much ; if he had said after the death of my son I give it over, that would have restrained it to an estate-tail—Now the preamble is very strong to this effect ; for, it is just as declarative, and as operative of his intent, as if there had been binding words. My intent and meaning is, that in case my two sons now living, or any other son or sons of mine lawfully begotten ; and according to this construction of his will by giving the words their utmost extent of this, or any other marriage, hereafter to be born, shall die without issue male of their bodies, it necessarily follows that they and the issue male of their bodies are to take—in what way are they to take ? why the example is put by the two sons that are alive, and as they must take an estate tail successively, so any after-born son must take an estate-tail successively—why then, if any after-born son of a subsequent marriage is to be construed that way, he must take an estate-tail—To my two sons now born, and any after-born son of this or any other marriage ; and upon this part of the case the powers of jointuring, leasing, and portions, are excessively material ; if it

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was clear that they must relate to the settled estate, which is not so certain, because they may have an effect by relating to the other estates; but as far as they warrant the argument they relate to both, and I do think the power of leasing must necessarily relate to both. The argument from that is, these powers are decisive; for, there is a power given to the after-born son to make a jointure, grant portions, and make leases; why, it is decisively tied up with the usual words, when they shall successively be in possession. If he had said, I mean them all to take estates tail one after another, he could not have said it more strongly; for, this shews they were to take estates-tail, and such estates as in the nature of them enabled them to make jointures, grant portions, and make leases: they have not such estates; for, a tenant in tail, without suffering a common recovery, cannot make jointures, grant portions, and make leases. They have not; and therefore that clause, so far as it applies, is as decisive, and as expressive, as if he had said, I devise to such after-born son an estate successively in strict settlement. What is desired of the court? Will they labour to suppose Sir William to have had a meaning, which it is certain he never had? And no idea to introduce that meaning, in order to defeat his whole intention which both sides agree to be so clear as to be indisputable; that certainly ought not to be done.—Therefore we shall make our certificate according to the ideas I have already expressed to have: in case we should alter our opinions, we shall signify if we desire a future argument.”

The Certificate. “Having heard counsel on both sides, and considered the case, we are of opinion, that the event of a second marriage was not in the testator’s contemplation; but supposing that, from the generality of the description of the words, ‘any after-born son’ should be extended to the son of any future marriage, we are of opinion, that from the manifest intention of the testator expressly declared in his will, such son must take an estate-tail; consequently we are of opinion, that, either way, a remainder after that estate is devised to Thomas the testator’s brother, who, by virtue of the said limitation, upon the failure of the sons of Sir William the testator, without issue male, was entitled to all the lands in the counties of Monmouth and Glamorgan (devised by the residuary clause in the said will), for life, with remainders according to the limitations in the said will.

MANSFIELD.

R. ASTON.

W. H. ASHHURST.

7th May, 1773.

Lord

Lord Chancellor Apsley decreed*, That the above certificate should be confirmed; from which Mrs. Jones, who was the daughter and heiress at law of Sir William Morgan, appealed to the House of Lords, who put the following question to the Judges:

“Whether Thomas Morgan the brother of the testator, and Thomas Morgan the younger, and Charles Morgan, or any or either of them, took any and what estate-tail in the lands in the counties of Monmouth and Glamorgan, by the residuary clause in the will?”

The lord chief justice (De Grey) of the Common Pleas delivered the unanimous opinion of the judges present†.

“That Thomas Morgan the brother took an estate for life in the estates in Monmouthshire and Glamorganshire, with remainder to Thomas Morgan the younger and Charles Morgan.”

1774.

Hillary Term.

In the memorable case of Lee against General Gansel it was solemnly determined that a bailiff, in execution of mesne process, may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house.

Lord Mansfield thus declared the opinion of the court:

“This is an application on the part of general Gansel to be discharged out of custody on the following ground: That the process issued against him by this court has been abused, and his person illegally arrested; for that the officer broke open the door of his apartment, which by law he could not do; therefore the court ought to discharge him, and put him in the same condition as before the arrest.

* July 23, 1773.

† May 2, 1774.

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“To this charge *three* defences are set up on the part of the plaintiff in the action and the officer complained against. The *first* is, that in fact the door was *not* broke open, but was previously *open*; and the officer having got part of his body, that is to say, his thigh in, after a struggle to get in the rest, in which he prevailed, arrested the defendant. The *second*, which goes to a denial of the whole ground of the application, is this, ‘That the door, which was broken open, the officer had a right to break open, due notice having been announced, and a refusal given.’ The *third* is, that, supposing Mr. Gansel founded in his application as to the mode of the arrest being illegal, yet his remedy is by trespass for breaking open the door, or by the more summary mode of *attachment* against the officer; nevertheless the supposed trespass upon his person is legal, for that the officer had a right to arrest him.

“These are the three defences; and, as to the *first*, there is so great a contrariety of evidence, that there must be false swearing. I doubt therefore where the truth lies: and, supposing the fact contended for on the part of the plaintiff in the action to be true, I doubt as to the consequence: that is, if an actual breaking open the door were illegal, I doubt as to the law, where a door being *partly* open is *shut* by the person who is within, against the officer who is struggling to get entrance. I doubt both as to the fact and the consequence; and therefore lay that entirely out of the case.

“The *second* ground of defence, and which makes the next question in this case is, ‘Whether *this* door might be *lawfully* broken open in execution of mesne process?’ And, as to that, the *case* is this: Mr. Mayo was *owner* of this house, in which general Gansel had, at the time in question, and for a long time before, taken the first floor, which consisted of two rooms, each of which had a door which opened upon the staircase; he had likewise, up two pair of stairs, two rooms, each of which had a door that opened in the same manner: he had the use of the kitchen besides, and he rented these several apartments, as a *lodger*, from *year* to *year*, though that circumstance makes no difference. Mr. Mayo *lived* in the house; and, which is the *material* part of the case, there is but *one* outer door to the house; at which Mr. Mayo enters to go to his apartment, and Mr. Gansel to go to his. This is a fact concerning which there is no controversy. Mr. Gansel was up two pair of stairs in his bedchamber, and, as he says, the door was locked; and, after notice, the officers broke it open; though nothing turns upon the notice or mode of breaking. The question is, ‘Whether by law this door could be broken open?’

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“ I should first state, however, that the *outer* door of the *house* was *open*, and that the officers entered there legally. The question therefore turns upon the subsequent breaking open of the bed-chamber door.

“ The books talk of the *privilege* of a *mansion-house*, and of the privilege of the *door* of it, which cannot be broken open. The whole question will therefore turn upon the *extent* of that which is called *privilege*. Now this rule of privilege, arising from a sound maxim of *policy*, is no privilege of a *debtor*, properly speaking, who absconds from justice in avoidance of legal process; but is annexed to the *house* and *door* (to which door I forbear at present to give any particular epithet) for the *protection* of a man and his family. It is therefore by consequence only, that the privilege is a protection to such a person, and not for his own sake. The sound maxim of policy is this, ‘ *that a greater evil should be avoided for a less, and a less good should give way to a greater.*’ The *outer* door therefore, or window of a man’s house, says the law, shall *not* be broken open by process. This has been long and well understood. The ground of it is this, that otherwise the consequences would be fatal; for it would leave the family within naked and exposed to thieves and robbers. It is much better, therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences. But as this is a maxim of law in respect of political justice, and makes no part of the privilege of a debtor himself, it is to be taken *strictly*, and not to be extended by any equitable analogous interpretation.

“ The oldest case to be found in the books, that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a case in the Year-book, 18 Edw. IV. page 4. pl. 19. ‘ There an action of trespass was brought for *breaking* the *outer* door in execution of a *feri facias*. The court held, that trespass would lie, for the officer shall *not break* open an *outer* door to execute his process: but when the officer had so got in, he *broke* open a *trunk*, and took out the goods that were in it; in respect of which they held, that trespass would not lie; for he had a right to break the trunk, and take the goods.’ I quote this case, not to imply that I should perhaps have been of the same opinion myself in a case of the first impression; but to shew, that the rule of privilege is taken most *rigidly*. Afterwards, in Semaine’s case, 5 Co. Mich. 2d fac. page 93. the same strict doctrine was held, namely, ‘ that breaking open the *outer* door was a tres-

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pass, but taking away the goods was lawful.' In Yelverton, *Mich.* 44. *El.* 29. which was the same case, Popham doubted whether *even* the *outer* door was privileged, because it would be a hindrance to justice: But afterwards, in *Mich.* 2 *Jac.* 5 *Co.* 92. *b.* 93. *a.* the whole court held, 'that the *outer* door ought not to be *broken open*;' and grounded their opinion upon the single authority of 18 *Edw.* IV. p. 4. pl. 19. before quoted. You see from hence with what *rigour* the privilege has been construed in the oldest cases.

"But no case or *dictum* has been cited at the bar, nor indeed did there ever exist a case, which intimated a doubt whether an *inner* door might not be broken open. In lord Hob. 62. and 263. among other outrageous things the bailiffs broke open a chamber door, having entered legally at the outer door; but such breaking was held lawful, the first entrance at the outer door, which was open, having been legal: and yet the latter was a very harsh case, for they broke in when the man and his wife were in bed, and behaved with great violence and outrage; but I lay stress on this to shew how *strictly* the privilege had been understood, when the *outer* door or *window* is secure, and the entrance has not been forcible, through either of them, so as to lay open the house and its inhabitants to insult and violence from without; but, on the contrary, has been quiet and peaceable. In addition to these authorities, I recollect a note of a case lately determined, which says, 'an *inner* door has no protection at all.' It was the case of Astley and Pindar, and was heard in the year 1760, *Mich.* 1 *Geo.* III. There all the other charges against the bailiffs were answered, except breaking the inner door, which was accompanied with such violence, that the door fell, and the officer with it into the room; but all the court were of opinion that the officers having lawfully entered at the *outer* door, might break open the *inner* to execute the duty of their office. Besides these cases, and in conformity to the principles upon which they have gone, I shall cite a very sensible and material distinction from a book in my hands, which is Foster C. L. title Homicide, c. 8. sect. 20. which is this, 'The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant, and perhaps farther than in the scale of reason and sound policy they will warrant. But in cases of life we must adhere to rules well known and established. But this rule is not one of those that will admit of any *extension*. It must therefore, as I have before hinted, be confined to the breach of windows

dows and of outer doors intended for the security of the house against persons from without, endeavouring to break in.'

"This brings the question to this point, 'Whether this was the *outer* door to the house of the defendant?' for the law, we have seen, does not privilege an inner door.

"It has been said, that this lodging is a house, and has an outer door; and it has been likened to the case of chambers in the inns of court, and in colleges which have each an outer door that opens, like the door in question, upon the common staircase, and which, in cases of burglary, have been held to be the houses of the respective occupiers. The fact is, that, from the nature of these buildings, they are *all* as *several* houses, and have *separate outer* doors, which are the extremity of obstruction, because the staircase is no outer door; again, they are enjoyed as separate property. In Lincoln's Inn they have separate estates of inheritance; in the others they have estates for life, and in colleges as long as they reside. So if that which was one house originally, comes to be divided into separate tenements, and there is a distinct outer door to each, they will be separate houses, as Newcastle House.

"The distinction therefore can only be between several outer doors and one outer door.

"How far lord Hale meant to carry his opinion in the passage that has been cited, it is difficult to say. Where a burglary is committed in the apartments of one who lodges in a house, the circumstance of the *owner's living* in it, or his occupying only a shop or cellar in which he does not *sleep*, makes a very material difference as to the form of the indictment; for, in the latter case the *lodger* has the *outer* door entirely to himself; and the burglary in such case must be laid in the house of the lodger; but it is otherwise in the former case, for there it must be laid in the house of the owner. And, notwithstanding the greatness of lord *Hale's* authority, it appears not clearly expressed, or perhaps not fully considered; at all events, we must not determine upon a single and uncertain *dictum*, against the many late and positive cases, grounded on the oldest decisions and most established principles.

"But, if there were nothing more to confute the doctrine which has exhausted so much learning and ingenuity in support of it, the absurdity of the proposition would of itself be sufficient. And it is this, that whereas the

greatest house in London has but *one* outer door; this gentleman, having *four* rooms in one house, shall have *four* distinct *outer* doors. If any of them could be said to be an outer door, it must be the door of the lower rooms; but the truth is, they are *all inner* doors.

“Therefore we are all most clearly of opinion, that by law *this* door was *legally* open.

“With regard to the point of relief, in case the arrest had been illegal, I give no opinion; though I think it would depend upon the behaviour of the party applying. It is possible a person might come to ask that relief, under circumstances of such gross misbehaviour as might induce the court to refuse it. Though the court, where a person is arrested who has been attending its process, will interpose, not only by punishing the officer but by discharging the prisoner out of custody, yet cases of this sort are always matters of discretion with the court under their particular circumstances.—But it is not necessary here to enter into that point; as we are all clearly of opinion that general Gansel was legally arrested, and therefore ought not to be discharged.”

Rule discharged.

On the 8th of June, 1774, Mr. Justice Gould came personally into court, to acknowledge his seal affixed to a bill of exceptions in the case of *Mostyn versus Fabrigas*; and errors having been assigned thereupon, they were, on the 14th of November, 1774, argued in support of trespass and false imprisonment lying in *England* by a native *Minorquin*, against a governor of *Minorca*, for an injury committed by him in *Minorca*.

“This was an action of trespass brought in the court of Common Pleas, by Anthony Fabrigas, against John Mostyn, for an assault and false imprisonment; in which the plaintiff declared, that the defendant, on the first of September, in the year 1771, with force and arms, &c. made an assault upon the said Anthony, at *Minorca*, to wit, at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, to wit, for the space of *ten months*, without any reasonable or probable cause, contrary to the laws and customs

of this realm, and against the will of the said Anthony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said Anthony from Minorca aforesaid, to Carthagera in the dominions of the king of Spain, &c. to the plaintiff's damage of ten thousand pounds."

One of the learned counsel closed his argument by wittily observing, "Should the judgement be reversed, I fear the public, with too much truth, will apply the lines of the Roman Satyrist on the drunken Marius on the present occasion, and they will say of Governor Mostyn, as was formerly said of Marius,

"Hic est damnatus inani judicio."

And to the Minorquins, if Mr. Fabrigas should be deprived of that satisfaction in damages which the jury gave him.

"At tu victrix provincia ploras?"

Lord Mansfield. "Let it stand for another argument. It has been extremely well argued on both sides, by Mr. Buller for the plaintiff and by Mr. Peckham for the defendant."

On the 27th of January, 1775, it was again very ably argued by Mr. Serjeant Glynn for the plaintiff, and by Mr. Serjeant Walker for the defendant.

The sacred character of a governor, the laws and customs relating to commerce with foreign countries, and the solid distinctions laid down respecting locality, or the place where actions are properly brought—these topics are defined by lord Mansfield with great energy and perspicuity in the following elaborate speech:

Lord Mansfield. "This is an action brought by the plaintiff against the defendant for an assault and false imprisonment; and part of the complaint made being for banishing him from the island of Minorca to Carthagera in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose; therefore he has stated it to be in Minorca, with a *videlicet*, at London, in the parish of St. Mary le bow,

bow, in the ward of Cheap. Had it not been for that particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas, *First*, 'not guilty;' *secondly*, that he was governor of Minorca by letters patent from the crown; that the plaintiff was raising a sedition and mutiny; and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island; which as governor, being invested with all the privileges, rights, &c. of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true: but he denies the truth of the *fact*; and puts in issue whether the *fact* of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, *out* of the realm of England, and no where else. To this the plaintiff has made no new assignment, and therefore by his replication he *admits* the *locality* of the cause of action.

"Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but, on behalf of the defendant, evidence different from the facts alleged in his plea of justification was given, to shew that the Arraval of St. Philip's, where the injury complained of was done, was not within either of the four precincts, but is a district of itself more immediately under the power of the governor; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case, the judge left it to the jury, who found a verdict for the plaintiff, with three thousand pounds damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us; and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the court.

"If I understand the counsel for governor Mostyn right, what they say is this. The plea of not guilty is totally immaterial; and so is the plea of justification; because upon the plaintiff's own shewing it appears, 1st, that the cause of action arose in Minorca, *out* of the realm; 2dly, that the defendant was governor of Minorca, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued, that the judge who tried the cause ought to have refused any evidence whatsoever, and have directed the jury to find for the defendant; and three reasons have been assigned.

One, insisted upon in the former argument, was, that the plaintiff, being a Minorquin, is incapacitated from bringing an action in the King's court in England. To dispose of that objection at once, I shall only say, it is wisely abandoned to-day; for it is impossible there ever could exist a doubt, but that a subject born in Minorca has as good a right to appeal to the King's court of justice, as one who is born within the sound of Bow-bell; and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of Utrecht, makes no difference. The two other grounds are, 1st, that the defendant being *governor of Minorca*, is answerable for no injury whatsoever done by him in that capacity; 2dly, that the injury being done at Minorca, *out* of the realm, is not cognizable by the King's courts in England. As to the first, nothing is so clear as that to an action of this kind the defendant, if he has any justification, must plead it; and there is nothing more clear, than that if the court has not a *general jurisdiction* of the subject-matter, he must *plead* to the *jurisdiction*, and cannot take advantage of it upon the *general issue*. Therefore, by the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded. Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case every thing relative to the Arraval of St. Philip's.

“The first point then upon this ground is, the *sacredness* of the defendant's person as *governor*. If it were true that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification; because *prima facie* the court has jurisdiction; but I will not rest the answer upon that only. It has been insisted by way of distinction, that supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of England, yet it shall *not emphatically* lie against the governor. In answer to which I say, that for many reasons, if it did
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not lie against any other man, it shall *most emphatically* lie against the governor.

“In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must shew the jurisdiction of the court of Wales; and in every case to repel the jurisdiction of the King’s court, you must shew a more proper and more sufficient jurisdiction; for if there is no other mode of trial, that alone will give the King’s courts a jurisdiction. Now in this case no other jurisdiction is shewn, even so much as in argument. And if the King’s courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore *locally, during his government*, no civil or criminal action will lie against him; the reason is, because upon process he would be subject to imprisonment. But here the injury is said to have happened in the Arraval of St. Philip’s, where, without his leave, no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King’s courts; because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

“Another very strong reason, which was alluded to by Mr. Serjeant Glynn, would alone be decisive; and it is this: that though the charge brought against him is for a *civil* injury, yet it is likewise of a *criminal* nature; because it is in *abuse* of the authority delegated to him by the King’s Letters Patent, under the great seal. Now if every thing committed within a dominion is triable by the courts within that dominion, yet the effect or extent of the King’s Letters Patent, which gave the authority, can only be tried in the King’s courts; for no question concerning the Seignory, can be tried within the Seignory itself. Therefore, where a question respecting the Seignory arises in the proprietary governments, or between two provinces of America, or in the Isle of Man, it is cognizable by the King’s courts in England only. In the case of the Isle of Man*, it was so decided in the time of queen of Elizabeth, by the chief justice and many of the judges. So that *emphatically* the governor must be tried in England, to see whether he has exercised the authority delegated to him by the Letters Patent, le-

* 4 Inst. 284.

gally and properly ; or whether he has abused it, in violation of the laws of England, and the trust so reposed in him.

“ It does not follow from hence, that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgement whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer ; and, if the nature of the case would have allowed of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an invasion of Minorca, the governor should judge it proper to send an hundred of the inhabitants out of the island, from motives of *real* and *general expediency* ; or suppose, upon a general suspicion, he should take people up as spies ; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known here that by the laws and constitution of Spain he was authorized so to act ? The way of knowing foreign laws is, by admitting them to be *proved as facts*, and the court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is ; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated*. So in the supreme resort before the King in Council, the Privy Council determines all cases that arise in the plantations, in Gibraltar, or Minorca, in Jersey, or Guernsey ; and they inform themselves, by having the law stated to them. As to suggestions with regard to the difficulty of bringing witnesses, the court must take care that the defendant is not surprized, and that he has a fair opportunity of

* Faubert v. Trust, Prec. Chan. 207.

bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission.

"If he wants the testimony of witnesses whom he cannot compel to attend, the court may do what the court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she never was married to him. She alledged a marriage in Scotland; but that she could not compel her witnesses to come up, to give evidence. The court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the court of session, or any of the barons of the court of Exchequer in Scotland, and that the depositions so taken should be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, unless the prosecutor had so consented. The witnesses were so examined before the Lord President of the court of Session.

"It is a matter of course, in aid of a trial at law, to apply to a court of Equity, for a commission and injunction in the mean time; and where a real ground is laid, the court will take care that justice is done to the defendant as well as to the plaintiff. Therefore, in every light in which I see the subject, I am of opinion that the action holds *emphatically* against the *governor*, if it did not hold in the case of any other person. If so, he is accountable in this court, or he is accountable no where; for the king in council has no jurisdiction. Complaints made to the king in council tend to remove the governor, or to take from him any commission which he holds during the pleasure of the crown. But, if he is in England, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore, to lay down in an English court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

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“ In lord Bellamont's case, 2 Salk. 625. cited by Mr. Peckham, a motion was made for a trial at bar, and granted, because the attorney-general was to defend it on the part of the king; which shews plainly that such an action existed. And in *Way versus Yally*, 6 Mod. 195. Justice Powell says, that an action of false imprisonment has been brought here against a governor of Jamaica, for an imprisonment there; and the laws of the country were given in evidence. The governor of Jamaica in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an act of the assembly which justified that imprisonment; and the court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried. I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against governor Sabine, who was governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave five hundred pounds damages.

“ The next objection which has been made, is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in England.

“ There is a *formal* and a *substantial* distinction as to the *locality* of trials. I state them as different things; the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgement cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the *sheriff* of the *county*; and as trials in England are in particular counties, the officers are county officers; therefore the judgement could not have effect, if the action was not laid in the proper county.

“ With regard to matters that arise *out* of the realm, there is a *substantial* distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise, as in the case alluded to by serjeant Walker: if two persons fight in

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France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the peace of the king; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

“But there is likewise a *formal* distinction, which arises from the mode of trial; for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad; but the law makes a distinction between *transitory* actions and *local* actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material; and if an imprisonment in Middlesex it may be laid in Surry, and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages. The place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the *venue*; but, if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is gone; because it is such a *variance* between the deed and the declaration as makes it appear to be a *different* instrument. There is some confusion in the books upon the *stat. 6 Ric. II.* But I do not put the

the objection upon that statute. I rest it singly upon this ground. If the true date or description of the bond is not stated, it is a variance. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a *venue* only for form, and for the sake of trial, by a *videlicet*, in the county of Middlesex, or any other county. But no judge ever thought that when the declaration said in Fort St. George, *viz.* in Cheapside, that the plaintiff meant it was in Cheapside. It is a *fiction* of *form*; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose therefore it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the *teste* of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation*: because the fiction was invented for the furtherance of justice, and to make the writ appear right in form. But where the *true* time of suing out a *latitat* is *material*, as on a plea of *non assumpsit infra sex annos*, there it may be *shewn* that the *latitat* was sued out *after* the six years notwithstanding the *teste*. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to say, that as men they have one way of thinking, and as judges they have another, which is an absurdity; whereas in fact they only meant to support the fiction. I will mention a case or two, to shew that this is the meaning of it.

“In 6 Mod. 228. the case of Roberts *versus* Harnage is thus stated: The plaintiff declared that the defendant became bound to him at Fort St. David's in the East Indies at London, in such a bond; upon demurrer, the objection was, that the bond appeared to have been sealed and delivered at Fort St. David's, in the East Indies, and therefore the date made it local; and, by consequence, the declaration ought to have been of a bond made at Fort St. David's,

* 2 Burr. 967.

in the East Indies; viz. at Islington, in the county of Middlesex; or in such a ward or parish in London, and of that opinion was the whole court. This is an inaccurate state of the case. But in 2 Lord Raym. 1042. it is more truly reported, and stated as follows: it appeared by the declaration, that the bond was made at London, in the ward of Cheap; upon oyer, the bond was set out, and it appeared upon the face of it to be dated at Fort St. George in the East Indies: the defendant pleaded the variance in abatement; and the plaintiff demurred, and it was held bad: but the court said that it would have been good, if laid at Fort St. George, in the East Indies, to wit, at London, in the ward of Cheap. The objection there was, that they had laid it falsely; for they had laid the bond as made at London; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from Latch, and a case from Lutwyche, on the former argument; but I will mention a case posterior in point of time, where both those cases were cited, and no regard at all paid to them; and that is the case of Parker and Crook, 10 Mod. 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is said in the declaration to continue at Fort St. George, in the East Indies; and upon the oyer of the deed it bore date at Fort St. George; and therefore the court, as was pretended, had no jurisdiction: Latch. fol. 4. Lutwyche, 950. Lord Chief Justice Parker said, that an action will lie in England upon a deed dated in foreign parts; or else the party can have no remedy; but then in the declaration a place in England must be alleged *pro forma*. Generally speaking, the deed, upon the oyer of it, must be consistent with the declaration; but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded; and here the contract being of a voyage which was to be performed from Fort St. George to Great Britain, does import, that Fort St. George is different from Great Britain: and after taking time to consider of it in Hilary term, the plaintiff had his judgement, notwithstanding the objection. Therefore the whole amounts to this, that where the action is substantially such a one as the court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county; matter of form is added to the fiction, to say it is in that county, and then the whole of the enquiry is, whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained

tained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant on the other side the Atlantic. There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before lord chief justice Lee, and another before me, in which I quoted that determination, to shew, that when the Lords Commissioners of prizes have given judgement, that is conclusive in the action; and likewise when they have given judgement, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration, that the ship was taken, or seized *on the high seas; viz. in Cheapside*. But it cannot be seriously contended that the judge and jury who try the cause, fancy the ship is sailing in Cheapside; no, the plain sense of it is, that as an action lies in England for the ship which was taken on the high seas, Cheapside is named as a *venue*; which is saying no more, than that the party prays the action may be tried in London. But, if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by Armenian merchants, for assaults and trespasses in the East Indies, and there are very strong authorities. Serjeant Glynn said, that the defendant, Mr. Verelst, was very ably assisted: so he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this case had been argued once; yet the counsel did not think it could be supported. Mr. Verelst would have been glad to make the objection; he would not have left it to a jury, if he could have stopped them short, and said, you shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions; that is, going to cases which in England would be local actions: I remember one, I think
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it was an action brought against captain Gambier, who, by order of Admiral Boscawen, had pulled down the houses of some futlers who supplied the navy and sailors with spirituous liquors; and whether the action was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down. the captain was inattentive enough to bring the futler over in his own ship, who would never have got to England otherwise; and as soon as he came here, he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of Skinner and the East India company was cited in support of the objection. On the other side, they produced from a manuscript note a case before lord chief justice Eyre, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova-Scotia, where there were no regular courts of judicature: but if there had been, Captain Gambier might never go there again; and therefore the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a court of equity lord Hardwicke had directed satisfaction to be made in damages: that case before lord Hardwicke was not much contested; but this case before me was fully and seriously argued, and a thousand pounds damages given against captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous; but I quote it for this reason; a thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

“ I recollect another cause that came on before me; which was the case of admiral Palliser. There the very gist of the action was local: It was for destroying fishing-huts upon the Labrador coast. After the treaty of Paris, the Canadians early in the season erected huts for fishing; and by that means got an advantage, by beginning earlier, of the fishermen who came from England. It was a nice question upon the right of the Canadians. However,
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the admiral, from general principles of policy, ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection; but it was not made. There are no local courts among the Esquimaux Indians upon that part of the Labrador coast; and therefore whatever injury had been done there by any of the king's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shews, that where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the king's dominions. Admiral Palliser's case went off upon a proposal of a reference, and ended by an award. But, as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you; and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion, not only against the objections made, but that there does not appear a question upon which the objections could arise."

The other three judges concurred.

Per Cur. Judgement affirmed.

Husband and Wife.

Re-delivery by the wife after the death of her husband* of a deed delivered by her whilst *covert*, is a sufficient confirmation of such deed, so as to bind her without its being re-executed or re-attested; and circumstances alone† may be equivalent to such re-delivery, though the deed be a joint deed by *Baron* and *Feme*, affecting the wife's land, and no fine levied.

* Cowp. Rep. 201. 22 Nov. 1774.

† *Expositio*, quæ ex visceribus causæ nascitur, est aptissima & fortissima in lege. 10 Co. 24.

The grounds of this decision seem to deserve the most serious attention of the jurisperit, who is here instructed to prefer the substance of a deed to the semblance of it. For instance, although it bears the semblance of a lease, it is in reality a security for money. Again; the distinction between the deeds of married women and infants is important. The first are void, the second voidable. The reference to that sound lawgiver, Perkins, was likewise happily made in the subsequent case of Zouch and Parsons; relating to Minors, anno 1765.

Lord Mansfield. " It is insisted by the defendants, that the several exhibits proved in the cause amount to a ratification of the mortgage by the lessor of the plaintiff. In strictness, a fine is the proper method for a married woman to part with her right, so that a formality of law only is wanting. But, in conscience, she has confirmed this security which was entered into for the maintenance and support of herself and family. She and her husband, in immediate want of money for their subsistence, apply to Greening to lend them one hundred and fifty pounds upon the mortgage of a reversion: Greening readily acquiesces, advances it without reserve, and is content to lie out of his money till the reversion should fall in. In a case so circumstanced, I thought it cruel to contend for the wife, that the mortgage was void; and, after so many solemn acts on her part, it is a proceeding against every principle of natural justice and equity. Therefore I directed the jury that, if they thought the facts given in evidence amounted to a sufficient confirmation by the wife, they should find for the defendants; and they have so done.

" Mr. Wallace, at the trial, put it on the footing of leases by husband and wife, reserving rent or no rent, which the authorities say are not void, but only voidable by the wife after the husband's death, and if she ratifies them she is bound. It was answered, that those authorities were by way of exception to the general rule of law, which says, the deed of a married woman is void, and they were allowed of, for the sake of agriculture and tillage. That this, it is true, is a lease for ninety-nine years, and a century ago the court would not have seen farther; but now it is said, the court must look farther, and see the real intent of the deed, namely, that it was a mortgage.

" We

“ We are all of opinion, that the answer is a good one, and that the exception to the general rule was allowed of, for the advancement of agriculture and tillage.

“ We are also of opinion, that the court ought to look into the substance of the deed, and to see with the same eyes as the rest of the world: it is in *substance a mortgage*, though in form a lease for ninety-nine years. But we think we have good authority to say, that the wife is nevertheless bound by it, and that her subsequent acts set up this mortgage against her.

“ Perkins, which is a very good authority in point of law, in section 154, says, ‘ It is to be known, that a deed cannot have and take effect, at every delivery as a deed; for, if the first delivery take effect the second delivery is void. As, in case an infant, or a man in prison, makes a deed, and delivers the same as his deed, &c. and afterwards the infant, when he cometh to his full age, or the man imprisoned, when he is at large, deliver again the same deed as his deed, which he delivered before as his deed, the second delivery is void; but if a married woman deliver a bond unto me, or other writing as her deed, this delivery is merely void; and therefore, if, after the death of her husband, she being sole, *deliver the same deed again unto me as her deed, the second delivery is good and effectual.*’ The Year-books, Mich. 3 Hen. VI. 4. and Hilary 8 Hen. VI. 8. confirm the proposition laid down by Perkins, namely, that the deed is not to be re-executed or re-attested, but delivered only. Now delivery is an act in *pais* only.

“ The question then is, Whether the law has laid down any precise form in which delivery must be made? or whether circumstances may not be equivalent to it without actual delivery?

“ Lord Coke in his Commentary on Lit. 36. says, ‘ As a deed may be delivered to a party without words, so a deed may be delivered by words, without any act of delivery; as if the writing sealed lies upon the table, and the feoffor or obligor says to the feoffee or obligee, Take up the said writing; it is sufficient for you, as it will serve your turn; it is a sufficient delivery.’ 2 Roll. Abr. 26. pl. 2.

“ This brings it to the single question, Whether these facts amount to a delivery? Now the mortgage-deed was in the hands of the mortgagee: the wife, after the death of the husband, the mortgagor, surrenders possession under her own hand to Saunders and Smith, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee in

terms. This is a clear acknowledgement that the deed was hers, and that she was content the defendants should enjoy according to the terms of the deed. Therefore we are all of opinion for the defendants, and that these facts were a confirmation of the mortgage, upon the ground of their being equivalent to a re-delivery of the deed."

Per curiam, unanimously,
Rule for a new trial discharged.

1775.

MINORS.

Zouch on the demise of Abbot and another against Parsons*.

In an important question in this cause, which had been twice tried, lord MANSFIELD, after stating the case minutely for the benefit of the students, introduced the following fine exordium:

"Miserable must the condition of minors be; excluded from the society and commerce of the world; deprived of necessaries, education, employment, and many advantages; if they could do *no* binding acts. Great inconvenience must arise to *others*, if they were bound by no act. The law therefore, at the same time that it protects their imbecillity and indiscretion from injury through their own imprudence, enables them to do binding acts for their *own benefit*; and, without prejudice to themselves, for the benefit of *others*.

"To mention a rule or two; the reasons of which are applicable to the present case.

"If an infant does a *right* act which he *ought* to do, which he was *compellable* to do, it shall *bind* him: as if he makes *equal partition*; if he *pays rent*; if he *admits a copyholder* upon a surrender. But there is no occasion to enu-

* 3 Burr. 1794.

merate instances. The authorities are exprefs; and the reason, decisive—
‘generally, whatsoever an infant is *bound to do by law*, the same shall bind him, albeit he doth it *without* suit of law *.’

“The 2d resolution in Conny’s case † is, ‘that although the infant in the case at bar was not compellable to attorn, because the manor was not conveyed by fine; yet, because by a *Mean* he was compellable to attorn, *scilicet* if a fine had been levied, the attornment was good.’ Fortescue lays it down larger, 18 H. VI. fo. 2. a. ‘He did but that which he ought to do: therefore the attornment is good.’

“The attornment of an infant to a grant by deed is good; *because it is a lawful act*: albeit he be not, upon that grant by deed, compellable to attorn.” Co. Litt. 315. a. The reason is manifest—a *right* and *lawful* act is not within the *reason* of the privilege, which is given, to *protect* infants from *wrong*. His being compellable by *any* mean, or in *any* way to do it, proves the act to be substantially what he ought to do.

“In the case of Holt *versus* Ward—the infant’s being compellable by the Ecclesiastical Court would have answered the objection made there, as much as her being compellable by the Common Law; therefore civilians were heard.

“To what end should the law permit a minor to avoid an act, which, in *any* way, through *any* mean, by *any* jurisdiction, he might be compelled to *do over again*, after it was undone? It would be assisting him to vex and injure *others*, without the least benefit to *himself*.

“Another rule, which may be collected from the books, is, ‘that the acts of an infant, which do *not touch his interest*, but take effect from an *authority* which he is *trusted* to exercise, are binding:’ as, where an infant-patron presents; an infant-executor duly receives and acquits, pays and administers the assets; an infant-head of a corporation joins in corporate-acts; an infant-officer does the duty of an office which he may hold.

“A third rule deducible from the nature of the privilege, which is given as a *shield* and not as a *sword*, is, ‘that it never shall be turned into an offensive weapon of *fraud* or *injustice*.’ As where tenant for life and infant

* Co. Litt. 172. a.

† 9 Co. 85. b.

in remainder levied a fine,—the infant reversed the fine, as to himself, of the inheritance, for nonage : yet he shall be bound by his assent to the fine and joining in it, nor to enter for the forfeiture. And the fine was held good as to the estate of tenant for life, and reversed *quoad* the infant only. *Pigot versus Ruffel*, 2 Leon. 108. Cro. Eliz. 124. S. C.

“ To see whether the reasons of these rules are applicable in the present case, it is necessary to ascertain what is in truth the nature of this transaction.

“ Part of the personal estate of William Cook consisted of one hundred and nine pounds, due from John Bicknell, secured by a mortgage in fee. His widow and infant-son were joint executors, and residuary legatees ; and, as such, intitled to this money. The fee which descended to the son was *merely as a pledge* for the money ; *besides the money*, the infant had *no beneficial interest* in the land whatsoever. Upon payment, he was bound to convey as the mortgagor should direct.

“ Conveying is no more than delivering up a security when it is satisfied. The money here was paid to the proper hand.

“ An adult, under the same circumstances, would have been guilty of a breach of trust ; if he had refused, he would have been compelled to do it, and would have been condemned in costs for refusing.

“ By act of parliament 7 Ann. * the infant was compellable to do it, during his minority.

“ It is much *stronger* here, that the money was *paid by the plaintiffs* ; who, upon the faith of this conveyance, and the title-deeds produced by *Bicknell* the mortgagor, advanced *more* money.

“ The *whole beneficial estate* belonged to Bicknell, after paying the one hundred and nine pounds. The infant's conveyance was matter of form, and in the nature of an *authority*, executed by Bicknell's direction, in favour of a third person who ventured his money upon the faith of it.

“ It would be *iniquitous* in the infant to avoid it. It would be *unjust* to set up the privilege, to make an innocent man lose his money, circumvented by his confidence in the infant's concurrence.

* V. c. 19. § 2.

“ But it could not even have that effect. It would be nugatory, and without any effect. For, if it was avoided, he must take the same conveyance over again; he would be *compelled* to do it. A conveyance to the *defendant* would be a breach of trust.

“ By the case stated upon the *first* trial *, it did not appear that the infant's conveyance was a right act; such as he ought, and was compellable to do. The court then ordered a new trial, to get a more correct state of the case.

Upon the *second* trial, it now comes out clear, that the infant was expressly a *trustee for the plaintiffs*. He was *paid* by them: upon the faith of the fee being in him they advanced *more money*.

“ If the fee was in a *stranger*, the plaintiffs have the *prior equity*. If *Thorne* had been prior, his letting the mortgagor have the title-deeds might be sufficient to *postpone* him; and the defendant had express notice.

“ There can be no doubt that the infant was compellable to do what he has done.

“ Upon the first question, we are all of opinion, ‘ that this conveyance binds the infant.’

“ But, supposing it not binding against him, or those who may stand in his place;

“ The second question is, ‘ whether the *defendant* can take advantage of the infancy; and, on that account, object to the conveyance?’

“ This depends upon two points; 1st, ‘ Whether this conveyance be void, or voidable only?’ 2dly, if voidable only, ‘ Whether the infant, by his entry before the Assizes, had absolutely avoided it?’

“ It is not settled, what is the *true ground* upon which an *infant's deed* is voidable only:—Whether ‘ the *solemnity of the instrument* is sufficient;’ or ‘ it depends upon the semblance of *benefit to the infant*, from the matter of the deed upon the face of it.’

“ As to the first, the *solemnity of the instrument*—we think the law is, as laid down by Perkins †,—That ‘ all *such* gifts, grants, or deeds, made by infants, which do not take effect by *delivery of his hand*, are void; but all

* See the beginning of this case.

† Sect. 12.

gifts, grants, or deeds, made by infants, by matter in deed or in writing, which *do take effect* by delivery of his hand, are *voidable*, by himself, by his heirs, and by those who have his estate.' The words *which do take effect* are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a *mere power* and convey *no interest*.

"In Bro. Abr. Title '*Dum fuit infra ætatem*,' pl. 1. (which cites 46 Edw. III. 34.) it is noted 'that a *dum fuit infra ætatem* was admitted to lie of a rent; and yet, by some, the grant of an infant was void and not voidable.' But (says the book) it is *not* so; for then this action would not lie. And besides, the *delivery* of a deed can not be *void*, but only *voidable*.

"There is no difference, in this respect, between a *feoffment* and *deeds* which convey an *interest*. The reason is the same.

"The *delivery of the deed* must be in the presence of *witnesses* as much as the livery of seisin. The ceremony is as solemn. The presumption 'that the witnesses would not attest, if they saw him an infant,' holds equally as to both.

"Littleton, who writes with great accuracy and precision, puts them both upon the same foot. He says*, "If, before the age of twenty-one, any *deed* or *feoffment*, grant, release, confirmation, obligation, or *other writing* be made by any of them, &c.; all serve for nothing, and may be *avoided*."

"In 2 Inst. 673, a bargain and sale *inrolled* by an infant is denied to be matter of record which the infant must avoid during his *minority*; but the book says, 'he may avoid it *when he will*.'

"An infant, or they who stand in his place, *can not* plead "*Non est factum*," and give the infancy in evidence; but they must plead the infancy *especially*, to avoid the deed: and that plea avoids it, by relation back to the delivery. The reason of this is, because it has an *operation* from the *delivery*; and not because it has the *form* of a deed.

"The deed of a *feme-covert* has the *form*; but she may plead '*Non est factum*;' because it has *no operation*.

* Sect. 259.

"The

“The distinction between the deeds of *femes-covert*, and of *infants*, is important: the first, are *void*; the second *voidable*.

“Perkins, Sect. 154. * says—‘And it is to be known, that a deed cannot have and take effect at *every* delivery, as a deed; for, if the first delivery take any effect, the second is void. As in case an infant make a deed and deliver the same as his deed, &c.; and afterwards, when he comes of full age, delivers it again as his deed; this *second delivery is void*. But, if a *married woman* deliver a bond unto me, or other writing, as her deed; this delivery is *merely void*; and therefore if, after the death of her husband, she, being single, deliver the same again unto me as her deed, the second delivery is *good and effectual*.’

“Two objections were made at the bar to this proposition; at least, in its extent. 1st, that leases by an infant, by deed, upon which *no rent* is reserved, are absolutely *void*: therefore the criterion, ‘whether the deed is void or voidable,’ does not depend upon the *delivery*; but upon the *matter and contents*—‘whether it may possibly be for the *infant’s benefit*.’ 2dly, A surrender by an infant, by deed, is *absolutely void*; therefore *all* deeds are not *voidable only*.

“As to the first, there are many *obiter* sayings; but there is *no sufficient authority*, clearly to outweigh the reasons against this position. I cannot find a case adjudged *singly* upon this ground. What looks the likest to an authority, is the opinion of Wray and Southcote against Gawdy, in Humphreston’s case, 16 Eliz. Moore 105. and 2 Leon. 216†: but there the judgement was upon the *rights* and *merits* of the case, and *not* upon the point of the *lease*. The question, as to the lease, arose upon the fictitious lease to try the infant lessor of the plaintiff’s title in ejectment. The two (Wray and Southcote) held ‘that, no rent being reserved, there was *no semblance of benefit to the infant*; whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovering. Besides, the lease was by parol.

“But reason soon prevailed; and it has been long settled, ‘that an infant *may* make a lease, *without* rent, to *try his title*.’ Very prejudicial leases

* Title, Fautes; page 32.

† V. also S. C. in Benlo. 195. Owen 64. Dyer 337, a. 1 And. 40.

may be made, though a nominal rent *be* reserved ; and there may be most beneficial considerations for a lease, though *no* rent be reserved.

“ What seems decisive is, ‘ that the *lessee* can in no case avoid the lease on account of the infancy of the lessor ;’ which shews it *not* to be void, but *voidable only*. And it is *better for infants*, that they should have an *election*.

“ As to the second—the authority of Lloyd * *versus* Gregory was cited : and sayings *arguendo*, in Thompson † *versus* Leach.

“ The case of Lloyd *versus* Gregory was determined upon the special verdict, by three judges ; of whom, Sir William Jones and Croke were two.

“ Sir William Jones reports, ‘ that the second lease being void, made an end of the question ; and that the judges gave no opinion upon the other points.’

“ The note in Croke ‡ does no say a word of the *only* ground of the judgement ; but rather supposes the second lease *good*, by arguing, ‘ that, there being no increase of term, or diminution of rent, it had no semblance of benefit.’ Croke’s note might be confounded with what passed upon the trial at bar ; for, Roll states sayings to that effect upon the trial at bar. 1 Ro. Abr. 728 §.

“ But Sir William Jones is certainly right ; for, the *second* lease was *void*. And no surrender, express or implied, in order to, or in consideration of, a new lease, would bind, if the *new* lease is *absolutely void* ; for, the cause, ground, and condition, of the surrender fails.

“ In Thompson *versus* Leach (which was a most favourable case for the plaintiff) much is said, in argument, ‘ to prove the surrender of an infant or lunatic to be void ;’ to get rid of some doctrine laid down in Whitting-

* Lloyd *versus* Gregory is reported in Cro. Car. 502, and Sir William Jones, 405, and is abridged in 2 Ro. Abr. 24. Title “ Fautes,” Letter I. pl. 6, and 495. Title “ Surrender,” Letter F. pl. 7, and in 1 Ro. Abr. 728. Title “ Enfants,” Letter B. pl. 2 and 3.

† 3 Lev. 284. 2 Ventr. 198, 199. 3 Mod. 296, 301. 2 Salk. 618. Parliament Cases 150. 1 Shower 296. Comberb. 438. 468. Carthew. 211. 435. Equity-Cases abridged, pa. 278. Pl. 3. 3 Salk. 300. 12 Mod. 173, and Holt 357, 623.

‡ Cro. Jac. 502.

§ Pl. 3.

ham's case *, 'that the remainder-man, injured by the act, could not avoid it.' But more is said to overturn that doctrine. There is no difference, in this respect, between the heir in tail and the remainder-man : neither claims *under* him whose act is in question ; but *both* claim *per formam doni*.

" In Palmer, 254 †, Dodderidge denies the doctrine ; and says, ' he in remainder, and the donor, *shall* take advantage of infancy ;' which is agreeable to Littleton's reasoning, sect. 635. It should seem against reason, that a feoffment made by an infant shall grieve or hurt *another*, to take from them their entry, &c.'

" Suppose the comparison between an infant and a man *Non compos* just (which it is *not*), the point of 'the surrender being void or voidable' was not necessary to the judgement in that case.

" I know of no judgement, upon the ground 'that such a surrender is void.' Most undoubtedly, the *other* party can not say so. If an infant was to surrender an unprofitable lease ; and, after acceptance, the premises should be burnt, overflowed, or otherwise destroyed ; the *lessor* never could say the surrender was void. There is no instance where the *other* party to a deed can object on account of infancy. Consequently, the infant may let the surrender stand, or avoid it ; which proves it to be *voidable only*.

" If a *new* case should arise, where it would be *more beneficial to the infant* 'that the deed should be considered as void ;' if he might incur a forfeiture, or be subject to damages, or a breach of trust, in respect of a third person, *unless* it was deemed void ; the reason of the privilege would warrant an exception, in such case, to the general rule.

" *Powers of Attorney* are an exception to the general rule, as to deeds ; and a power to *receive seisin* is an exception to *that*. The end of the privilege is, 'to *protect* infants :' to *that* object, therefore, *all* the rules and their exceptions must be directed.

" But be the point upon the *solemnity of the delivery* as it may (for there are respectable sayings the other way) ; it is not necessary to our determination. For we are all of opinion, 'that the one hundred and nine pounds received, and the other circumstances of the transaction, *shew* a semblance

* 8 Co. 43. H. 45 Eliz.

† In Darcy *versus* Jackson (to the third point of that case.)

of benefit, *sufficient* to make it *voidable* only, upon the *matter* of the conveyance.'

2nd Point of
the second ge-
neral question.

"If it be *voidable only*, the second point is, 'whether the infant, by his *entry* before the assizes, (which appears to be *during his minority*), has *avoided* it.'

"At the Common Law, the *only* conveyance in *pais*, of the freehold and inheritance of land, with transmutation of possession, was by *feoffment*. If it was tortious, the disseisee was obliged to *enter*, to re-vest his possessory title; and then he might bring an action of trespass. So, in the case of feoffments by an infant; he might *enter during his minority*, to re-vest his possessory right, for the sake of the profits; but still the feoffment was *voidable only*; and he might *elect* to confirm it, when he attained his full age.

"The *reason* why an infant cannot bring any writ analogous to a *Dum fuit infra ætatem*, during his minority, is, 'that his *election* may not be bound by the judgement.'

"Whether an entry be of any *use* in the present case, is not material: it is sufficient; that it cannot have any *larger* effect than in the case of a feoffment. The infant is alive, still a *minor*. The defendant can not elect for him; he is a *mere stranger*, in every view; and has no estate affected by the conveyance.

"We are all of opinion, 'that the *plaintiffs* ought to recover.' And it is well for the defendant we are of this opinion. He would get nothing by defeating the plaintiffs here; for finally, in *another* mode of proceeding, the conveyance must be *confirmed*; and the defendant would be to pay all the *costs* here and there.

"It is fortunate for the suitors on both sides, when, consistent with rules and forms of proceeding, *that justice*, which must be the *final* determination of the question, may be done in the *first* stage of the litigation.

"The consequence of what has been said, is, that

The *Postea* must be delivered to the Plaintiffs."

Love Acres, on the demise of Mudge, against Bligh et Ux.

The Testator devises thus, 'as touching my worldly estate, I devise the same as follows. I give to my wife M. 5l. to be paid yearly

ly out of my estate at G. *Item*, to T. M. and E. 5l. each, to be paid twelve months after my decease. *Item*, to my two sons T. M. &c. R. M. whom I make my _____ and ordain my *sole executors*, all my lands and tenements freely to be enjoyed and possessed alike.' T. M. and R. M. are *tenants in common*, and take a fee.

"Lord Mansfield. The principles by which this case must be governed, are settled by analogy to establish rules respecting the limitation of estates by deed at common law. If a man by deed of conveyance at common law gives land to another *generally*, without words of *limitation*, the donee has only an estate *for life*. But I really believe, that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. For, common people, and even others who have some knowledge of the law, do not distinguish between a bequest of personalty, and a devise of land or real estate. But, as they know when they give a man a horse, they give it him for ever; so they think if they give a house or land, it will continue to be the sole property of the person to whom they have left it. Notwithstanding this, where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life: because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law.

But, as this rule of law has the effect I have just mentioned, of defeating the intention of the testator in almost every case that occurs; the court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise out of this rule. Therefore, if a man says, 'I give *all my estate*,' that has been construed to pass a fee: or, even if words of locality are added, as '*all my estate in A*,' it has been held, that the *whole* of the testator's *interest* in such particular lands will pass, though no words of limitation are added. 2 P. Wm's. 524: because the law says, that the word 'estate' comprehends not only the land or property which a man has, but also the *interest* he has in it. So, in a late case from Ireland *, the court had no difficulty in saying, that the words '*all my wordly substance*,' in the introductory part of the will, meant every thing the testator had; and that

* Hogan, *ex dim.* Wallis, versus Jackson, Cowp. 299.

the words 'all his *real effects*,' in the subsequent residuary devise, were equivalent to *worldly substance*, and carried every thing to the residuary devisee. In general, wherever there are words and expressions, either general or particular, or clauses in a will which the court can lay hold of, to enlarge the estate of a devisee, they will do so to *effectuate* the intention. But if the intention of the testator is *doubtful*, the rule of law must take place: so, if the court cannot find words in the will sufficient to carry a fee, though they should themselves be satisfied beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law.

"Now, though the introduction of a will, declaring that a man means to make a disposition of *all his worldly estate*, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee where he has used no words of limitation, it will not do *alone*. And all the cases cited in the argument, to shew that the introductory words in this case would *alone* be sufficient, fall short of the mark; because they contained other words clearly manifesting the intention of the testator to pass a fee.

"The question is always a question of construction, and depends upon observations naturally arising out of the will itself. And therefore, if in this case there are words in the will which denote an intention in the testator to give his sons more than an estate for life, the court will give effect to that intention.—Now if a man devise lands to another, *paying thereout 100l.* * or any other gross sum, though he add no words of limitation, yet the devisee shall have a fee: because unless he were to take a fee, he cannot be sure of paying the 100l. So if an estate be given to *A. to be sold for payments of debts and legacies* †, the purpose to be answered makes it a fee, without words of limitation. In short, wherever any thing is directed to be done, which, strictly speaking, an estate for life only may not be sufficient to answer, the court will imply a fee.

"Let us examine then the observations that arise upon this will.—The first material observation upon which it has been argued that the testator meant to give his younger sons a fee in this case, is, a bequest to his wife of an annuity of 5*l.* &c. which he gives thus: 'I give to my wife the sum of 5*l.* to be paid yearly out of my estate called *Glose*, and also one part of the dwelling-house with as much woodcroft home *at her*, as she shall have need

* Wellock versus Hammond. 2 Leo, 114.

† 1st. Chan. Cases 196-7.

of, by my executors hereafter named.' It is clear, that in this devise some word is misplaced or left out; and where that is the case, if it be necessary to discover the intention of the testator, the court may supply it. Now the most obvious word to be supplied here, as it strikes me, is the word 'request;' *at her request*, would make the sense complete. Then, as to the devise itself, the 5*l.* is directed to be paid by the executors out of the estate, and the wood is to be provided at all events; it therefore must be supposed to be brought home from off the estate. But, if the executors were to take only an estate *for life*, they would not be able to pay the annuity during her life out of the profits only, or to furnish all the wood she might want; because the stock on the estate might fall short. It is but reasonable therefore to infer, that such an interest was intended as would enable them to comply with the testator's directions, fully and completely, in every respect.

"It is not an immaterial observation that has been made upon the devise over of the household goods to the executors, to be equally divided between them as the testator expresses it, 'after *my* death,' which should clearly have 'been after *her* death.'

"The next observation arises upon the words 'whom I make *my*, and ordain, &c.' The word *my*, without some addition, means nothing at all. It cannot mean *executors*, because the testator has expressly inserted that word afterwards. It seems, therefore, most natural and proper to insert the word *heirs*. But I rest upon the other grounds rather than upon the conjecture how the blanks should be filled up.

The last observation is drawn from the words '*freely to be possessed and enjoyed by them alike*.' Now the word '*freely*,' strikes me as a very material word: for the testator has charged the estate with the payment of the annuity to his wife, &c. so that he could not mean by the word '*freely*' to give it *free of incumbrances*. The free enjoyment, therefore, must mean, *free from all limitations*; that is, the absolute property of the estate.

"Upon these observations arising on the face of the will itself, coupled with the introductory clause, I am of opinion, upon the first question, that the testator's intention was to give his sons John and Robert a fee. If so, it is equally clear, upon the second question, that this is a *tenancy in common*. The word '*alike*' is the same as the word '*equally*,' and, in the devise of the household goods, the testator has made use of the word *equally*. Therefore the lessor of the plaintiff is entitled to a moiety.

The three other judges concurred *per Curiam*.

Judgement for the Plaintiff for one moiety.

1776.

The King against John Tubbs *.

The power of *impressing* seamen, sea-faring-men, and persons whose occupations and callings are to work in vessels and boats upon rivers, is founded upon immemorial usage; and there may be a legal right of exemption upon the same foundation. The legal enquiry as to facts which will or will not amount to proofs of such exemption produced the following constitutional and energetic speech:

Lord *Mansfield*. "I am very sorry, that either of the respectable parties before the court, the city of London on the one hand, or the lords commissioners of the admiralty on the other, have been prevailed upon to agitate this question.

"Of the utility of this man to the city of London, or to the lord mayor, no one can seriously speak. A man retained to earn half a crown a day, without badge or livery, without any obligation upon him to attend; whose entrance into the service of the lord mayor is voluntary, and who, if he chuses to quit it for any other employment, creates no inconvenience to any body, or a difficulty to supply his place! Notwithstanding this, if the city of London has a privilege of protecting thirty-one persons from being impressed, they have a right to insist upon such privilege. On the other hand, where is the immense utility to the public service with regard to these thirty-one persons, whether they are impressed or not? It is impossible they can be an object. The utility therefore, in the one case or other, cannot be the ground of the present dispute; but it must have arisen upon this: The city would not ask, or take the exemption of this man as a *favour*, but insist upon it as a *right*, and in a manner in which they never insisted upon it before; and the admiralty, jealous of new rights of exemption being set up, would not grant it as a *right*. The real question between them is, Whether there is a *legal right of exemption* or not?

* Cowp. 512.

“ I was in hopes the court would have had an opportunity of investigating this point to the bottom, instead of being urged to discuss it so instantaneously, and without any evidence with regard to the foundation of the claim. I own, I wished for a more deliberate consideration upon the subject; but, being prevented of that, I am bound to say what my present sentiments are.

“ The power of pressing is founded upon immemorial usage, allowed for ages; if it be not so founded and allowed for ages, it can have no ground to stand upon, nor can it be vindicated or justified by any reason but the safety of the state; and the practice is deduced from that trite maxim of the constitutional law of England, ‘ that private mischief had better be submitted to, than public detriment and inconvenience should ensue.’ To be sure there are instances where private men must give way to the public good. In every case of pressing, every man must be very sorry for the act, and for the necessity which gives rise to it. It ought therefore to be exercised with the greatest moderation, and only upon the most cogent necessity; and though it be a legal power, it may, like many others, be abused in the exercise of it. A bailiff may execute legal process in such a manner as the court would commit for. In like manner, the power of pressing may be abused; as by pressing the watermen of the lord mayor whilst they are in the act of rowing him in his barge. And many other instances might be put.

“ Being founded in immemorial usage, there can be no doubt but there may be an exception out of it, on the same foundation, upon immemorial usage. I therefore lay out of the case all that has been said about the necessity of an act of parliament to create an exemption; and likewise all that has been mentioned relative to the doubt stated of the power of the crown to exempt by charter. If it were at all necessary to go into that question here, it might be sufficient to observe, that all the rights of the city have been confirmed by act of parliament; but what has been approved by immemorial usage allowed for ages, is always supposed to have had a good beginning. Therefore, if the exception or exemption stands upon that ground, it is as good as the institution itself.

“ The only question upon what appears before us is, ‘ Whether, in fact, there is evidence of such usage as a matter of right?’ I say, as a *matter of right*; for, it is well known, that many persons have granted protections,

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many having given badges to watermen, and have claimed that they should be exempt. Peers have done it; and questions in the House of Lords have arisen upon it. Members of the House of Commons have retained watermen; and perhaps the Lords of the Admiralty may have paid regard to applications made in behalf of such men, and may have discharged them. So here, if the parties had cared to have made such application, it might have been attended to, and complied with; for, as a matter of *favour*, it is impossible to suppose the Lords of the Admiralty would have made a moment's hesitation or dispute; but it is insisted on and claimed as a *matter of right*.

“Let us see, therefore, whether this is an established exemption of *right*.

“Every exemption throws the burthen heavier on those who are subject to bear it. Therefore, for their sakes, as well as for the public service, all exemptions ought to be examined and clearly set out. In the first place, it does not appear from any law-book, it does not appear from any history, it has not been suggested at the bar, that there is, throughout the whole kingdom, any other exemption by the common law. When I speak of exemption, I mean exemption out of the description: for to suppose the usage extends to private gentlemen amusing themselves with yachts, &c. is absurd.

“Persons liable must come purely *within the description* of seamen, sea-faring men, &c. He therefore who is not within the description, does not come within the usage. The commission is not to press landmen, or persons of any other description of life but such men as are described to be sea-faring men, &c. Officers are not within the description. It is a very strong circumstance, therefore, that there is in fact no other exception stated or alluded to, which rests upon the common law. There are many exemptions by statute; but they are grounded upon considerations of public policy, at the particular times of their being made; and upon the circumstances of its being in fact better for the service, that the objects of those acts should be exempted, than that they should be subject to be pressed; as apprentices, landmen entering voluntary, fishermen, all foreigners; and in respect of these last-mentioned, the reason is very obvious; for, during the time of war, the Act of Navigation has been dispensed with, and two-thirds of the crew of merchantmen have been allowed to be foreigners. Harpooners and others have been exempted. A line has been drawn with respect to the age; and many other instances might be put; but the exemption of those called
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the watermen of the city of London is to be found in no statute or common law book whatsoever.

“ Let us see, then, how the usage stands upon the evidence *now* before the court. A certificate from the water-bailiff is produced, the contents of which have been read; and in the affidavits apprehensions are stated of a reputed custom, that these thirty-one watermen are exempted from being impressed. *Four* instances and no more are produced, which arose at different times; and in respect of which this equivocal kind of fact is stated, that four persons were pressed, and that upon application from the lord mayor to the Admiralty they were immediately, or soon after, discharged; but what the nature of the application was, whether *requested* as a matter of *favour*, or *demanded* as of *right*, is not stated. If requested as a matter of favour, it would have been very extraordinary for the Lords of the Admiralty to have refused it. Here the application is an application of right, by an order of court of the lord mayor and aldermen. As to *three* of the instances produced, it is not ascertained what they were; nor is there any memorandum or mention made of them in the Admiralty books. As to the *fourth*, the man had so little idea of legal right to be *exempted*, that he offered to find another person to serve in his room. And this is the only instance where the court sees the manner of the application. On the other hand, very strong circumstances as to what has been the usage, arise from the instructions which are given to the officers employed on the impress service, and which it would be unpardonable in the Admiralty to omit. In these instructions every *known* and established legal mode of exemption is expressly taken notice of and set out. In addition to this, it is sworn by Mr. Stephens in his affidavit, ‘that there never was any instruction given not to press the watermen of the city of London.’ If it were a legal right, the city should have insisted on having that right taken notice of in the instructions. Even particular protections from the Navy and Victualling Office are taken notice of; but there is no mention made of any protection from the lord mayor with respect to his watermen. There is no instance of any officer upon the impress service ever having paid any regard to a water-bailiff’s certificate, nor any case produced where the city has taken it up as a matter of right, or insisted upon it as such in a court of justice. Therefore, to give my opinion upon the case as at present stated, and upon the mere fact, whether this

exemption as *here claimed* is, or is not, warranted by immemorial usage, I say it is. At the same time this opinion is without prejudice to any future evidence to be adduced in support of the claim, if any such can be furnished."

Bexwell against Christie *.

An investigation of the unfair practices made use of at auctions, and the principles which ought to prevail in fair sales, took place in a cause wherein it was determined, that an action does not lie against an auctioneer for selling a horse at the highest price bid for him, contrary to the owner's express directions not to let him go under a larger sum named. Otherwise if the owner had directed the auctioneer to *set* the horse *up* at such a particular price, and not lower.

Lord Mansfield. "The matter in question is in itself of small value; but in respect of the principles by which it must be governed, it is a question of great importance. Since the trial, I have mooted the point with many who are not lawyers, upon the morality and rectitude of the transaction. The question is, whether a bidding, by the owner of goods, at a sale, under these conditions, *viz.* 'that the highest bidder shall be the purchaser, and, if a dispute arise, to be decided by a majority of the persons present;' is a bidding within the meaning of such conditions of sale.

"There is no express undertaking on the part of the defendant, nor is it, as has been ingeniously said, a direction, that there should be no bidding under 15*l.* which might be fair: but the direction given to the defendant is, 'not to let the horse go under 15*l.* which implies that there might be a bidding under that sum.' The question then is, 'whether the owner can *privately* employ another person to bid for him.' The basis of all dealings ought to be good faith; so more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder: that could never be the case, if the owner might secretly and privately enhance the price, by a person em-

* Cowp. 395.

ployed for that purpose ; yet tricks and practices of this kind daily increase, and grow so frequent, that good men give into the ways of the bad, and become dishonest in their own defence. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale, and upon the public. The disallowing it is no hardship upon the owner. For, if he is unwilling that his goods should go at an under price, he may order them to be set up at his own price, and not lower : such a direction would be fair : or he might do as was done by lord Ashburnham, who sold a large estate by auction ; he had inserted in the conditions of sale, that he himself might bid once in the course of the sale : and he bid at once 15 or 20,000*l*. Such a condition is fair ; because the public are then apprised, and know upon what terms they bid. In Holland it is the practice to bid downwards.

“ The question then is, is such a bidding fair ? If not, it is no argument to say, it is a frequent custom. Gaming, stock-jobbing, and swindling, are frequent. But the law forbids them all. Suppose, there was an agreement to abate so much ; which is the case where goods are sold by one person in the trade to another ; they abate sometimes ten or fifteen *per cent*. Such an agreement between the owner and bidder, at a sale by auction, would be a gross fraud. What is the nature of a sale by auction ? It is, that the goods shall go to the highest real bidder. But there would be an end of that, if the owner might privately bid upon his own goods. There is no contract with the auctioneer : he is only an agent between buyer and seller. He may fairly bid for a third person who employs him ; but not for the owner.

“ In this case there is another fraud put upon the public. For, by the catalogue, the goods are described to be ‘ the goods of a gentleman deceased, and sold by order of the executor.’ Upon this representation many people would attend to bid, on a supposition that the goods were necessarily to be sold at all events, whether valuable, or not valuable ; whereas they might have their suspicions, if they were the property of persons living. Horses, or any other species of property, belonging to persons that are dead, are not so likely to be faulty, as those which are parted with by persons in their lifetime.

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“We all remember the sale of a gentleman's wines*, where vast quantities had been sent in belonging to other persons: and all sold at a very high price, under an idea they were his. The consequence was, most of the buyers were taken in.

“Therefore, upon full consideration, I am of opinion, that a bidding for the owner, in the manner contended for, and agreeable to the directions given in this case, would have been a fraud upon the sale: and consequently that this action against the defendant, as auctioneer, cannot be maintained.”

In Easter term, 1796, this determination was recognized by lord chief justice Kenyon, in the case of Howard and Castle, which was an action brought to recover the difference between a first and a second sale at an auction, wherein the very able successor paid the following tribute of respect to his *illustrious predecessor*, as he has frequently been pleased to define him.

“The case of Howard and Castle is similar to that of Bexwell and Christie, where lord Mansfield exhausted the subject, and had decided it on the noblest of all principles—to preserve honesty between man and man. It was happy for the public that, by the latter case, lord Mansfield's capacious mind had quashed a great system of fraud, by the precedent he had made, and which his successor was very happy to follow.”

* Mr. Bradshaw.

The sound construction of words in a deed is to effectuate the intention of parties, and not to counteract or destroy their real meaning.

Pugh et Ux. against the Duke of Leeds.

Godolphin Edwards, under a power reserved in his marriage-settlement, to lease for twenty-one years in *possession*; but not in *reversion*; grants a lease to his only daughter for twenty-one years, to commence *from the day of the date*—adjudged a good lease. The word “*from*” may mean either *inclusive* or *exclusive*, according to the *context* and *subject-matter*; and the court will construe it so as to *effectuate* the deeds of parties, and not *destroy* them.

The jurisperit will, in the following argumentative-speech, have the pleasure of finding the diapprobation of the lord chief justice very pointed and strong against the practice of entangling property in nets of form.

Lord Mansfield. “The cases that have been determined here, went very much against my opinion, and that of the court. They were determined upon the authority of the counts of Portland’s case, in the *Exchequer*, supposing the point to have been settled by that determination. But I have since had occasion to re-consider the question. I think the ground upon which it went, and the cases there cited, have been mistaken. It is very fit that a solemn judgement should be given upon a point that has been so much confounded.” The court ordered it to stand over.

Nov. 28, 1777. Afterwards, on this day, being the last day of the term, lord Mansfield delivered the opinion of the court as follows:

“This case was an issue to try, whether a lease made by one Godolphin Edwards, bearing date the 10th of October, 1765, was a good or a bad lease. The case went down to a trial, and several objections were raised; but they were all given up except one, which was this, that the lease was made for twenty-one years, to commence ‘*from the day of the date.*’ It arises on a

marriage-settlement in the year 1724, by which a power is reserved to Godolphin Edwards to make leases, with many restrictions and qualifications; and amongst the rest the following, 'that they were not to be in reversion, remainder, or expectancy.' And therefore the question is, 'Whether this be a lease *in possession*?' And it turns upon this, Whether to commence *from* the day of the date in this deed is to be construed *inclusive* or *exclusive* of the day it bears date? I will first consider it as supposing this a new question, and that there never had existed any litigation concerning it. In that light the whole will turn upon a point of construction of the particle 'from.' The power requires no precise form to describe the commencement of the lease, the law requires no *technical* form. All that is required, is only enough to shew, that it is a lease in possession, and not in reversion; and therefore if the words used are sufficient for that purpose, the lease will be a good and valid lease.

"In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word 'from' must always *depend* upon the *context* and *subject-matter*, whether it shall be construed *inclusive* or *exclusive* of the *terminus a quo*: and whilst the gentlemen of the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both *inclusively* and *exclusively*: If the parties in the present case had added the word '*inclusive*' or '*exclusive*,' the matter would have been very clear. If they had said, 'from the day of the date *inclusive*,' the term would have commenced immediately; if they had said 'from the day of the date *exclusive*,' it would have commenced the next day.

"But let us see whether the context and subject-matter in this case do not shew, that the construction here should be *inclusive*, as demonstrably as if the word *inclusive* had been added. This is a lease under a power, the lease refers to the power, and the power requires that the lease should be a lease *in possession*. The validity of it depends upon its being in possession, and it is made as a provision for an only daughter. He must therefore *intend* to make a good lease. The expression then, compared with the circumstances, is as strong in respect of what his intention was, as if he had said in express words, 'I mean it as a lease in possession, I mean it shall be so construed;' if

If it is so construed, the word 'from' must be *inclusive*. This construction is to support the deeds of parties, to give effect to their intention, and to protect property. The other is a subtlety, to overturn property, and to defeat the intention of parties, without answering any one good end or purpose whatsoever. And though Courts of Justice are sometimes obliged to decide against the convenience, and even against the seeming right, of *private* persons, yet it is always in favour of some great *public* benefit. But here to construe 'from the day of the date' to be *exclusive*, can only be to defeat the intention of the parties. If such a construction were right, it would hold good, supposing the lessee had laid out ever so much money upon the estate; and all would be alike defeated by a mere blunder of the attorney or his clerk. Therefore, if the case stood clear of every question or decision which has existed, it could not bear a moment's argument. Secondly, I will consider this question upon the authorities. I have arranged all the cases that have been determined in Westminster Hall, in order of time; and, when I come to state them, you will be surprized to see they stand so little in the way, as *binding* authorities, against justice, reason, and common sense. All they shew is, the great uncertainty of the meaning, and the impossibility of putting an absolute sense to hold good in cases; they are themselves so many contradictions backwards and forwards."

Although a minute enumeration is avoided of all the cases on this subject which had been determined in the course of several centuries, and which the jurisperit will find in Mr. Douglas's Reports, 718 to 722 both *inclusive*; yet the last of these cases is too important to be passed over.

"In 1743 there happened a case of great litigation in the Exchequer, which arose thus. Lord Pembroke had got a lease from the crown of a spot of ground in Privy Garden, and had built a house upon it at a great expence. The countess of Portland had also a lease of an adjoining spot, and had built her house next to lord Pembroke's. There was another house belonging to the duchess of Portland adjoining lady Portland's; all three held under the crown. Between the three houses and the River Thames, there was a terrace, which had been part of the queen's garden. Neither of them thought of applying for the terrace; and it would have been thought invidious to

have done so. It was to be in common. Upon the circumstance of this terrace, lord Pembroke laid out a considerable sum of money upon his house. At the expiration, however, of her lease, the countess of Portland applied to renew; a new lease of fifty years was granted, in which, without notice to lord Pembroke, she got the terrace inserted and added. When lord Pembroke heard of it, he was much offended, but still more so at the use that was made of it; for, the countess planted trees, which, if they had grown up, would have intercepted lord Pembroke's view; however, some fatality attended them, for they all died after a certain time. Lord Pembroke wanted to avoid this lease; not to take away lady Portland's house, but to get back the terrace, and leave it in the state it was before. Application was accordingly made to the officers of the crown about it; and at last the attorney-general was directed to file an information for the terrace, and an information was accordingly filed in the Exchequer. A variety of objections were made to different flaws, supposed in the lease; but the principal objection was found upon the Civil-list act, 1 Anne, st. 1. c. 7. which directs, that all leases to be granted of any of the crown-lands shall be void, 'unless made to commence *from the date or making*.' This lease was made to commence '*from the day of the date or making*.' Upon this it was argued for the crown, 'that *the date* and the *day of the making* were *inclusive*; and that the act of parliament had expressly declared the lease should be in those terms; but *that from the day of the date* was *exclusive*, and therefore the lease was void for the variance.' On the part of the countess it was contended, that 'from the date,' and 'from the day of the date,' were both the same. Upon the argument, all the cases were cited that have been now cited, except the two I have mentioned. Sir Thomas Parker, and Mr. Baron Reynolds, were of opinion, with the objection, that it was a void lease because it commenced *in futuro*. The two other barons were of a different opinion upon this point; but, upon another point, they were of opinion the lease was void. Sir Thomas Parker, and Mr. Baron Reynolds, to the contrary; so that, for different reasons, they were all of opinion the lease was *void*. Upon a case, which happened in this court* since, this case between lord Pembroke and the countess of Portland was mentioned. Upon memory, as

* Doe ex Dem. Baynton versus Watton, Cowp. 189.

the judgement appeared to me in so unfavourable a light, I took it for granted that the court had been as it were compelled by the weight and force of authorities. But now I will tell you why I change my opinion, after having determined the case of Doe *versus* Watton as I then did, out of a great veneration for Sir Thomas Parker, and because I did not care to set up an opinion of my own against a solemn judgement. Sir Thomas Parker intending to favour the world with the publication of some cases that were adjudged in his time, he did me the honor to desire I would peruse them. I have done so; and reading a very elaborate report of the countess of Portland's case, it brought back to me in a regular view the whole doctrine upon the present subject. There I saw how the authorities stood; and I likewise found another thing mentioned in that case, which seems to me not to have been properly argued at the bar by the counsel in support of the lease. It is this: the parties concerned had searched all the leases from the time of the Civil-list Act down to the moment of that upon which the question was then in agitation; and they were nearly half the one way and half the other; eighty were granted 'from the date or making,' and above seventy 'from the day of the date of making.' All these leases had passed the great seal, and likewise the seal of the Exchequer. The argument drawn from this circumstance was, that usage should get the better and prevail over the act of parliament, which was in fact an admission at the same time by implication, that 'from the day of the date' was contrary to the act. It struck me in a different light, which is, that the question turned upon the construction of the English words, and what sense they bore. If I was right, nothing can be so strong as that all the officers of the crown, who had been concerned in making these leases, looked upon the words as synonymous, and suffered them to pass and repass unnoticed. It is demonstration, that, by using *both indifferently*, they understood them to be *both the same thing*.

"I mentioned this to Sir Thomas Parker, and found my opinion supported by Sir Eardley Wilmot. Sir Thomas Parker, with that candour which always accompanies great abilities, gave so far way to it, that he had doubts upon the determination. He therefore suppressed the report of the attorney-general *versus* the countess of Portland; and I would not have produced it upon this occasion, but that he has given me leave to mention his

name as approving of the present determination. This relieves me from the difficulty I should have had in differing from his authority.

“ To conclude : the ground of the opinion and judgement which I now deliver is, that ‘ from ’ may in the vulgar use, and even in the strictest propriety of language, mean either *inclusive* or *exclusive*. That the parties necessarily understood and used it in that sense which made their deed effectual. That the courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them ; more especially where the words themselves abstractedly may admit of either meaning.

“ If there was nothing more in question than that all the law-officers concerned had, in the above-mentioned cases, considered the two expressions as synonymous ; that would be sufficient to guide my opinion ; therefore let there be judgement for the plaintiff.

“ I should say farther, that instantly, upon what passed between Sir Thomas Parker and myself, I acquainted some of the counsel at the bar that there was a change of opinion, as to the authority of the case in the Exchequer.”

1779.

Upon an application to the Legislature, at this period of time, for a Divorce-bill ; a noble lord very conversant in pedigrees, and attentive to claims of peerage, took notice, that the lady whose misconduct and incontinency gave rise to the bill, was in the title of the bill, and not only *in limine*, but also in the bill throughout, described baroness Conyers, without having strictly complied with the standing order of the house respecting the claim of peerage. This standing order is supposed to have been made some years ago, on the motion of the late earl of Egmont, and to have been introduced by a very learned, eloquent, and elaborate disquisition of the dignity of the British peerage, and the great propriety, wisdom, and necessity, of strict attention, to the observance of rule and order in all future discussion, in the House of Lords, of claims to any branch of the peerage.

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The previous proofs and ceremonies required by the above-mentioned standing order, prompted and compelled the noble peer, however reluctantly, to oppose the usual proceedings in the farther progress of the bill, until the proofs required by that order were regularly made, or rendered unnecessary to be made, by an alteration in the bill of the style and title of the lady.

A long and learned debate took place. The law-lords in succession endeavoured to convince the noble earl who made the objection of the solid distinction between an actual claim of peerage, and the style and title barely assumed by the lady in the present bill. The earl of Mansfield himself, even with his usual display of eloquence, failed in his repeated efforts to induce the noble lord who objected to the progress of the bill to wave his objection.

At this period, and in this painful suspension, the venerable father (of the noble marquis), who was greatly advanced in years, and much indisposed, had, in addition to these infirmities, the pressure of a disturbed mind, in hearing from day to day, that his son's bill met with an unexpected opposition, respecting the forms and standing orders of the house.

Towards the close of the third day, a noble lord who had many years presided in committees on private bills, did the author of these sheets the honor to come down to the bar, and lament that nothing could be hit off, by the counsel for the bill, to take off the noble lord's objection. A fair occasion this, for the Author, who had the honor of settling the bill as counsel for the marquis, to suggest, that in Lord Clarendon's History, the famous, or rather infamous, lady Roos is thus recorded—that, in a bill in parliament, her injured husband assumed the style and title of baron Roos; which title not having been then regularly established, provision was deemed necessary to be made; and it was accordingly provided and declared, that the same should neither weaken or destroy, nor in any degree strengthen or confirm, the claim
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of the petitioner to the barony of Roos, but that such claim should remain, as if no such act had been made.

Pleased with any prospect of success, however distant or improbable, the simple tale was told to the earl of Mansfield, who was pleased to send the assistant-clerk of the house again and again to the author, to learn all the material circumstances.

Few were necessary, in his lordship's fertile and perspicuous mind, to enable him to form a clear, comprehensive, and convincing speech.

He rose, and calmly observed, 'how much their lordships were indebted to the noble lord, for his unremitted attention, to preserve in the greatest purity every recognition of, and every claim of title to, a British peerage. The great benefit which had flowed from that perseverance on the one hand, and from the praiseworthy patience of the House on the other, in the present business, during a discussion of several days, would be obvious to all who heard him, when, in addition to all that had been already advanced by many lords in the course of the debate, antient records and modern history had been resorted to, and even ransacked, which he conceived could not fail to diffuse a pleasing light over, and dissipate every shadow of doubt which had enveloped, the present business. 'Your lordships,' he farther observed, 'all have a perfect recollection of lord Clarendon's anecdote of a famous lady Roos, who declared, 'that, if she thought any child of hers had a drop of the blood of the *Manners's* in its veins, she would herself open the vein, and let it out.'

"To turn our eyes from this high-spirited lady, and fix them more usefully on her injured husband, who was styled Lord Roos in the bill then depending in parliament—we find that, in ancient times, lords of order have ever been attentive to preserve the purity of the claim of an antient barony, or of any higher line in the peerage. The wisdom of those lords of order gave birth to a saving clause, which he who runs may read :

“ Provided always, and it is hereby enacted and declared, that nothing in this act contained shall extend or be deemed to extend, either to establish and confirm, or to prejudice or defeat, the right, title, or claim of the said or his heirs, of, or to, the barony of Roos, or any privilege or precedence in respect thereof.”

No sooner had this concise wonder-working clause been read, than the Earl of Mansfield emphatically observed, ‘ that he had so high an opinion of the candor and abilities of the noble lord, who had not only made, but who had very laudably persevered in, his objection, as to be fully persuaded, that the motion which he should immediately have the honor to make would be highly approved of; and would, possibly, be seconded by the noble peer himself.

The motion of course was, that a similar clause should be introduced into the bill, then depending, ‘ that it should neither establish and confirm, nor prejudice or defeat, the right, title, or claim, of the said lady Amelia Darcy, or her heirs, of or to the barony of Conyers, or any privilege or precedence in respect thereof.’

The noble lord who opposed the progress of the bill very candidly admitted, that the cases were so apposite, as to recommend the motion very forcibly, and that the most pleasing proof he could give of his entire approbation was, to adopt the advice of the great law-lord, and second the motion; which being done, the bill travelled quietly through the House, and passed into a law.

1780.

We now approach to a period which produces an event disgraceful to the age and country in which the fact was committed.

An union of folly, enthusiasm, and knavery, had excited alarms in the minds of some weak people, that encouragements were given to the professors of the Catholic faith, inconsistent with the Protestant religion and true policy.

The act of parliament which excited this clamour had passed with little opposition through both Houses, and had not received any extraordinary support from lord Mansfield. But the minds of the public were enflamed by artful representations, and the rage of deluded mobs was directed against the most eminent persons in the kingdom.

Who could have thought that such outrages would have disgraced so enlightened a period as 1780? Posterity will scarcely credit the audacious threatenings of this memorable year—a year pregnant with mischiefs, rapine, and riots, which were practised, and perpetrated, not only in the shades of night, where riot and confusion are generally hatched, and where these pests of society love to dwell, but even in the very face of noon-day. A year ever to be remembered with astonishment and horror. With *astonishment*, when it is considered by what a small number of rioters, and by what pigmy-champions in general, houses were demolished, contributions levied openly in the most public squares; and the doors and gates of the strongest prisons, Newgate itself not excepted, opened wide to pour forth new forces well trained and ready to enter upon the most desperate service*.

* Fortunately for the public weal some time was taken in these irregular attacks; so that there was room for recollection and preparation against their attempt on the great repository of national wealth, the Bank of England.

With

With *horror*, as long as the many calamitous circumstances are recollected to which each day of riot gave birth; one of which, not only Westminster-Hall in general, but every intelligent reader will seriously lament, and which the author of these sheets must *ab imo corde* ever deplore; from his knowledge of the invaluable loss of books and manuscripts which perished in the conflagration of the earl of Mansfield's house, and which would have diffused a splendor over these pages, which cannot by any possibility now be cast, elucidated, or supplied. The rich fruits of many years fine harvests were in a moment destroyed; and nothing but poor gleanings, in private studies, are left for the labourer of the present day.

This *annus mirabilis*, 1780, cannot fail to excite curiosity in readers of every denomination. A faithful detail of the ruinous confusion, which was happily put an end to in a very few days, may, when contrasted with the complete anarchy of late years, pregnant with the most dreadful outrages, murders, and assassinations, in another country, not only stamp a degree of credibility on the most extravagant, and seemingly incredible events of the riots in London in 1780, but also fully evince this great truth—that, from whatever causes riot and anarchy spring, the effects will (if they are not seriously and timely prevented) be invariably the same—will, like Pandora's box, diffuse far and wide the evils of desolation, misery, and ruin! But, as it is foreign to the purpose of this publication to write or even attempt to portray a faint sketch of historical events, the author must beg permission to confine his observations on this memorable period to such a plain detail of facts as fell within his own knowledge on the one hand, and as will throw light on such transactions wherein the earl of Mansfield was either in his private or judicial capacity principally and personally interested.

On the evening of the second day's riot, Sir John Hawkins, Mr. Brooksbank, and another magistrate for the county of Middlesex, discharged their duty as vigilant magistrates, by waiting on the lord chief justice of England at his house in Bloomsbury-square. They found his lordship in conference with his very respectable and near neighbour the archbishop of York. Their painful embassy was, to announce that the avowed design of the rioters * that evening was to destroy by fire the houses of the lord chancellor, and lord chief justice, and one or two more, which were marked, and then well-known. The magistrates having made an humble tender of their assistance and advice; the lord chief justice asked (as the author was credibly informed), what his grace the archbishop proposed to do. The answer was worthy of a Briton: "To defend myself and my family in my own mansion, while I have an arm to be raised in their defence." The reply was, "'Tis nobly said; but, while an archbishop, like a true church-militant, is strong enough to protect himself—a feeble man, and an old man must look up to the civil power for protection." This concession having been made, the magistrates took a fair occasion to recommend the admission of a detachment of the guards into the house; but whether the noble owner thought their admission might make the enraged mob more desperate, or that it would be more efficient to keep the guards at a small distance, in the vestry-room of Bloomsbury church, until they were really wanted, is not in the power of the author to determine. The lord high chancellor preferred the admission of a serjeant's guard into his house in Great Ormond-Street; and by the circuitous marches of this small body of men from Ormond-Street to the duke of Bolton's, and counter-marches from Bolton-house to Ormond-street, in a

* Strange to tell, they made no scruple of avowing from time to time who were the victims, on whom they meant to wreak their vengeance.

very short space of time, the rioters had every reason to believe, and one of them was heard to proclaim to his brethren, "the Chancellor's house is brim full of the guards;" and emphatically to exclaim, "'Tis d—d foolish to run our breasts against bayonets—d'ye see how they are ready to *pink* us at the parlour-windows?" These pithy exclamations, and the sight of a few pointed bayonets, had a wonderful effect. And the captain of the company of guards, who was my author, told me with some humour, that, as detachments of the guards were wanted in almost every part of the metropolis, he thought it fair to play the old soldier, and to multiply his handful of men in the best manner he was able. A garden-door in the lord chancellor's house, which communicated with the fields, was very convenient for this purpose. He placed three or four centinels at the parlour-windows, as has been noticed; and all the rest, being ushered through the garden into the fields, wheel'd round by the duke of Bolton's house and Queen's-square to Ormond-street again. But, ere they re-entered, the few rioters then assembled heard the captain of the guard ask the corporal, "When will the next detachment arrive?" The answer was, "Please your honor, in a trice—they are almost in sight." The corporal could speak with greater precision, since in fact the men had hardly been ever out of his sight—though perfectly concealed by art, as if under the sable cloud of night, from the rioters; by one of whom, probably their captain, the watch-word was given, "Let us decamp to the corner of Bloomsbury."

The fatal consequence is too well known; and the irreparable loss of all lord Mansfield's books and manuscripts, we repeat, with sorrow, is ever to be deplored.

In this instance we can only lament, that so great a lawyer and statesman was not, in this hour of imminent danger, so great a general as the then lord chancellor.

So unexpected was this daring outrage on order and government, that it burst on lord Mansfield without his being prepared in the slightest manner to resist it. He escaped with his life only, and retired to a place of safety, where he remained some time. On the 14th day of June, the last day of term, he again took his seat in the court of King's Bench. "The reverential silence," says Mr. Douglas, "which was observed when his lordship resumed his place on the Bench, was expressive of sentiments of condolence and respect, more affecting than the most eloquent address the occasion could have suggested."

The amount of lord Mansfield's loss which might have been estimated, and was capable of a compensation in money, is known to have been very great. This he had a right to recover against the *hundred*. Many others had taken that course; but his lordship thought it more consistent with the dignity of his character, not to resort to the indemnification provided by the legislature. His sentiments on the subject of a reparation from the state were communicated to the board of works in a letter, dated 18th of July, 1780, written in consequence of an application which they had made to him, as one of the principal sufferers, pursuant to directions from the Treasury, founded on a vote of the House of Commons:

"Besides what is irreparable, my pecuniary loss is great. I apprehended no danger, and therefore took no precaution; but, how great soever that loss may be, I think it does not become me to claim or expect reparation from the state. I have made up my mind to my misfortune as I ought, with this consolation, that it came from those whose object manifestly was general confusion and destruction at home, in addition to a dangerous and complicated war abroad. If I should lay before you any account or computation of the pecuniary damage I have sustained, it might seem a claim, or expectation of being indemnified. Therefore, you will have no farther trouble, upon this subject, from, &c.

MANSFIELD."

Bishop

Bishop *Newton*, in his own *Life and Anecdotes*, speaking of the distresses and miseries brought upon his country in the Spring 1780, pointedly observes,

“That the fury of the mob was directed principally against those who had no hand in the bill, was discharged chiefly upon the friends of government, and particularly upon the great and venerable dispenser of law and justice, who was not even present at any reading of the bill, and, having himself injured no man, concluded, in the integrity of his heart, that no man would injure him. As he resembled the great Roman orator in several particulars, so in this among others; for, Cicero’s house was, in like manner, set on fire and pulled down by the wicked faction of the profligate Clodius. It was really wonderful, after such a shock as he had received, that he could so soon recollect himself, and so far summon up his faculties, as to make one of the finest and ablest speeches that ever was heard in parliament, to justify the legality of the late proceedings on the part of government, to demonstrate that no royal prerogative had been exerted, no martial law had been exercised, nothing had been done but what every man, civil or military, had a right to do in the like cases, ‘I speak not from books,’ said he, ‘for books I have none,’ having been all consumed in the fire. The effects of his speech were the admiration and conviction of all who heard him, and put an end to the debate without a division. Lord Mansfield never appeared greater in any action of his life.”

The great Ruler of the Universe can, however, educe good out of evil.—*Et, si licet parva componere magnis*—the following anecdote which had its birth, phoenix-like, from the ashes of the riots, will probably be acceptable by way of note to the jurist-prudent.

Before the Restoration of good order, all the houses in Ormond-Street, and probably in many other streets and squares, had some portion of the guards billeted on them, as it were for their protection. The author, on that occasion, had the honor of receiving a message from one high in power, communicated to him by the alert and much-beloved captain Strickland, afterwards promoted to higher rank in his profession, but now, alas! no more. The purport of this message was, to procure, if it was practicable, temporary
barracks

barracks or lodgings for the military in the colonades of the Foundling-Hospital. Fortunately the application was made on a Wednesday, the only day in the week when the general committee meets; and it was more flattering to the author to return a satisfactory answer, that the business was already done, the same thought having occurred to himself, and the application had been followed with immediate orders for their reception.

On this occasion, the then treasurer of the hospital, Mr. Whatley, ever attentive to the interests of the hospital, put the following question:

“Sir, as you have succeeded in your suit, pray tell me, whether two executors, who want proof from our books of the death of a foundling-child, and who have given your treasurer much trouble, may not be brought to give *five guineas* to the charity?”

The cause on which this important question was put was simply this. A *disciple*, or, in plainer terms, an *apprentice* of the humorous Hogarth, who had received a legacy of 1000*l.* Bank stock from his reputed father, deemed it to be an act of distributive justice to transmit to an illegitimate child of his, who had gained admission into the Foundling-Hospital, the specific valuable legacy he had received—*Quod mihi dedit Apollo, &c.* The real fact was, that the child died in the life-time of the testator, without his knowledge; and there not being any residuary legatee in the will of Mr. Dawes, his executors were advised, that they were entitled to the lapsed legacy, *on proof of the death of the child being established in due form* by the certificate of the governors of the Foundling-Hospital. The executors persisted in demanding the certificate *ex debito justitiæ*. The author, as a governor of the charity, and as a lover of certainty, desired to peruse a copy of the will. He soon discovered that the mother of the child had only a pittance of 5*l.* a year to keep her from starving, and that the executors had each of them a legacy *for their pains and trouble*. The testator himself, being illegitimate, could not have any next of kin; and it occurred to the author, that the crown had a better title to the 1000*l.* Bank stock than the executors. Delays in matters of claim, like many other delays, being very dangerous, a *memorial* to Lord North, then the first Lord of the Treasury, and also president of the Foundling-Hospital, was recommended, and instantly drawn up by the author to the following effect.

“To

“To the Right Honorable LORD NORTH, First Lord Commissioner of his Majesty’s Treafury, and Prefident of the Foundling-Hofpital.

“The Memorial of the Governors of the faid Hofpital,

“Humbly fheweth,

“That Mr. Dawes, who was himfelf illegitimate, left by his will 1000*l.* Bank ftock, to his illegitimate child, a foundling.

“That, by the death of the child in the father’s life-time, the legacy became lapsed; and there not being any refiduary legatee or next of kin, the crown was confidered to be well entitled to the Bank ftock by *efcheat*.

“That the governors, who deplored the great lofs they had fufained in the fall of ftocks in *confequence of the American war*, implored that his lordfhip would be pleafed to alleviate their lofs, remunerate the firft informers, and make them *nominees*, on the part of the crown, for the benefit of the *charity*.”

The memorial, though adjudged to be rather laconic, and not a little farcaftic in the allufion to the American war, was received with that good humour and pleafantry which ever diftinguifhed the noble lord then at the head of the Treafury. But the executors were not on their parts inactive, and, previous to the *nomineefhip* being perfected, they had not only intituted a fuit by *Mandamus* to compel the Bank-directors to transfer to them the ftock, but had alfo engaged the celebrated Mr. *Dunning* and other able counfel in their caufe. The very able and ingenious leading counfel, on the hearing in the Court of King’s Bench, where lord Mansfield prefided, entertained the court by faying, he was inftructed to bring forward this curious and ftrange doctrine, which had been advanced by fome wife governors of the Foundling-Hofpital, ‘that a man could not difpofe by will of his perfonal eftate becaufe he was illegitimate.’ The gravity of the bench relaxed into a fmile; and the bar hoped to be gratified, and farther entertained, with the names, and at the expence, of thofe wife governors.

Be this as it may.—The Chief Juftice clearly faw that the cafe was witty, if not wickedly miftated; and his lordfhip had too much wifdom, penetration, and found judgement, to grant the *Mandamus*. The next effort of the executors, by the able advice of their counfel, was to bring a fpecial action of *affumpfit*, againft the Governor and company of the Bank *. It fell

* Vide Doug. Rep. 508.

to the lot of the earl of Mansfield to try this action at Guildhall. Previous thereto the author had the honor of a conference with the Chief Justice and one of the judges of his court. In this difficult case, new in specie, and little light thrown upon it in any law-book, whether personal estate will escheat to the crown,—on this occasion the noble earl was pleased to say, he was possessed of a manuscript case in point; but that, with ten thousand others, were destroyed by the rioters, and he much doubted whether the bar could supply the loss. His lordship then put this close question to the author—‘Have you found in the printed books a single case to guide our judgment one way or the other?’ The plain answer was, ‘I had carefully searched, but could find none; except a *dictum* of his lordship’s, in the MS. note I had fortunately in my possession of the case of Burges and Wheat; and on the accuracy of that note I had the greatest reliance, because a friend of Sir Thomas Clarke had very obligingly intrusted me with the original argument in the hand-writing of the Master of the Rolls, to examine and collate with my own copy; and of the correctness of the note of the Lord Chief Justice’s argument no one could be so perfect a judge as his lordship, whose words were, ‘In *personal estates*, which are allodial by law, the *King is last heir* where *no kin*, and the king is as well intitled to that as to any other personal estate.’ I therefore flattered myself, it would be fair to argue the point, on principles of analogy to the crown’s right to real estates by escheat.

It was not a little flattering, to a private individual, to be assured by such high authority that this was the right plan, and to be encouraged to persevere, although a laugh had been raised on the former trial unfairly, at the expence of the Governors of the Foundling-Hospital. The simple fact was, that the testator had not disposed of the Bank stock *in the event of the child’s death*. No man in his senses could dispute his right, illegitimate as he was, to make such contingent disposition.

“When the cause assumed a new shape, Proteus-like, on the trial at Guildhall, the Chief Justice with much pleasantry asked Mr. Dunning, what he thought of his new adversaries the Foundling-Hospital governors rising up cloathed and armed *cap-à-pié* with the nomineehip of the crown? The candid and ingenious answer was, ‘My Lord, this Foundling-cause now appears in a coat of another colour, and I must be allowed to do the best I can for the *poor executors*, my *poor clients*.’ Mr. Dunning’s clients were foiled and disappointed a second time; yet they put a good face on their bad cause, and threatened to appeal to *the House of Lords* against the last verdict. Mr. Wallace, the late Attorney General, was the leading counsel for the Hospital,

tal, and as such very ably opposed Mr. Dunning. And although the greatest part of the bone of contention, the 1000*l.* Bank stock, would inevitably in the course of an expensive appeal have been well picked by the law, yet, in honour to the memories of these two great lawyers, Mr. Dunning advised, and Mr. Wallace seriously requested, the author of these sheets to promote the following compromise; 'that the Foundling-Hospital should receive 500*l.* clear and all their costs, and that the poor executors might be permitted to divide the residue.' One objection only to this self-denying proposition occurred to the author, which he stated to Mr. Wallace: 'You have not once thought of the poor mother of the Foundling-child, who is probably now starving on the pittance of 5*l.* a year; and without whom the bone of contention would never have been the subject of this consultation. Give the poor mother 500*l.* an equal share with the hospital; and let Mr. Dunning's clients, the *poor executors*, take in God's name the surplus; a surplus certainly not less than 500*l.*' This division accordingly took place, and thus some unexpected good sprang out of evil. The author of these sheets has the pleasure to add that the moot point of an *escheat* of *personal estate* has since been judicially settled by the late Lord Chancellor Thurlow, in the cause of Middleton and Spicer, reported in Brown, page 201. His lordship very pointedly observed, that it would be mere pedantry to run over all the cases to be met with on this subject, which are collected and fully stated in Burges's and Wheat, 1 Blackstone, 123. His lordship farther added, in proof of the similarity between the case then before him, and the Foundling-Hospital case: "The executors having legacies bequeathed, and being clearly trustees, cannot by any possibility take any beneficial interest. The executors being excluded, and no relations to be found, I consider the executors as much trustees for the *crown*, as they would have been for any of the next of kin, if these could have been discovered." His lordship therefore decreed in favor of the *crown*.

Doe Lessee of Fonnereau and Fonnereau*.

In what instances an estate for life by one instrument will unite with an estate-tail by a different instrument, so as to give

* Dug. 470.

an estate of inheritance to the first taker, on the one hand; or will not unite, and thereby preclude him, on the other, from defeating the estates in remainder.

November 22, 1780. An estate to A. for life in a *deed*, and a limitation of the same estate to the heirs of the body of A. in a *will* (though the estate by the deed was voluntary, and moved from the testator, and is recited in the will) do not unite so as to give A. an estate tail, but the heirs of the body take by *purchase*. A devise of a real estate to B, after one to the heir male of the body of A, from and after the decease of A, and limited on default of such issue, is a good executory devise, vesting either in *possession* on the death of A, without leaving issue-male, or as a *remainder after an estate-tail*, on his death leaving issue-male.

The case was argued in Trinity Term 19 George III. by Rooke for the plaintiff, and Wilson for the defendant; and again in Hilary Term 20 George III. by Hill, serjeant, for the plaintiff, and Dunning for the defendant; and in Easter Term following, lord Mansfield delivered the opinion of the court in favor of the defendant. A few days afterwards, however, his lordship directed that the judgement should be stopped, and the case argued again in the ensuing term; accordingly there was a third argument in Trinity Term, 20 George III. by the *Solicitor-general* for the plaintiff, and Grose, serjeant, for the defendant; after which the case stood over for this day, when judgement was given for the plaintiff.

After the second argument, lord Mansfield said, There was no doubt what the intention was; the only question was, if that intention could be fulfilled consistently with the rules of law. He desired the counsel would see if they could find any cases, besides that of Baldwin *versus* Karver, where a double contingency had been implied in a case of real estate. As to Baldwin *versus* Karver, he thought the decision had not gone upon that point, and
he

he had always considered it as the settled doctrine since the case of *Firth versus Chapman* that a double contingency may be implied as to personalty, but not as to real property."

A few days afterwards his lordship said, "He had directed the certificate of the court, in *Baldwin versus Karvar*, to be searched for, and copied." He then read it, and it thereby appeared, that, although the court had suspended their opinion, and given the heir at law and personal representative leave to be heard by their counsel against the validity of the devise to the grandchildren, they did not instruct counsel to object to it; and therefore the court avoided the question, and only gave their opinion on the point between the different grandchildren, on the supposition that the devise over was good.

On Friday the 14th of April, 1780, his lordship having asked Hill, serjeant, whether he had been able to find any case of real property where the court, on the words "*in default of such issue*" had implied a restriction to "*issue living at the death of the father*," or, where a double contingency had been implied, *viz.* *to the issue, if there should be any, and if none, to the devise over*; he said, he had not met with any; and thereupon his lordship delivered the opinion of the court to the following effect:

Lord *Mansfield* (having stated the special verdict). "The case then lies in a very narrow compass. If the eldest son was tenant in tail, the recovery was good, and barred the limitations over; or, if the limitations over were too remote, he was entitled as heir at law. As to his being tenant in tail, a considerable objection has been made, *viz.* that he was tenant for life under the *settlement*, not under the *will*; and several authorities have been cited, to prove that the previous and subsequent estates, when limited by different conveyances, cannot unite. But, if they did not unite in this case, when the first limitation in the will was an executory devise, which remained contingent till the death of Thomas, and the estate given to the second son was also executory, and being after an indefinite failure of issue was too re-

mote; therefore, *quacunqve via data*, the devise by Thomas, under which the defendant claims, was good.

On Tuesday the 18th of April, 1780, his lordship said, the court had decided that the devise to the second son was void, on the authority of the case of Goodman *versus* Goodright, as reported by Sir James Burrow; but that they had since seen a manuscript note of that case, taken by Mr. Kenyon, which assigned a ground for the determination different from that stated by Sir James Burrow. That the court, upon this, entertained considerable doubts concerning the opinion delivered a few days before, and desired to have the case argued again.

This day his lordship delivered the ultimate opinion of the court, as follows:

Lord Mansfield. "After the second argument, and upon consideration of the case, we were of opinion, and gave judgement accordingly, that either Thomas was tenant in tail, by connecting his estate for life in the deed, with the limitation in the will to his heirs male (without saying it was our opinion that they could unite); or that the limitation over was too remote, as being after an indefinite failure of issue; and we could find no case where the court, in a will of real property, had raised an implication to confine the failure of issue to the life of the ancestor. But afterwards, turning the cases on this subject in our minds, and considering the reasons on which they proceed, namely, to prevent perpetuities; we stopped the judgement, and desired the case might be again spoken to. It has been argued a third time; and we have changed our opinion, and shall give our reasons. The rule is unquestionable, that there cannot be an executory devise after an indefinite failure of issue; but that is not the case here. We all think, that the estate for life being by one instrument, and the limitation in tail by another, they cannot unite, and that the heirs male of Thomas would have taken by purchase. This is a settled point; and we lay it down as our clear opinion. What are the limitations here? They are to the heirs male of the body of Thomas, and in default of such issue to the second and other sons. There are two ways, in form of law, in which this last limitation may take effect.

effect. 1. If Thomas dies, leaving issue-male, then the estate to the second son takes effect immediately, as a remainder expectant, which may be barred by a recovery. 2. Suppose the other alternative (which really happened) that Thomas has no son, then it is an executory devise to the second son, if Thomas at his death leave no issue-male. This is within the limits established by law to prevent perpetuities. We have looked into the cases, to see how far this reasoning upon principle can be supported by authorities; and we think there are three which go a great way. 1. In *Stephens versus Stephens*, the court took a large stride of twenty-one years after a life in being. The argument was, that this would not create a perpetuity. Former cases had said, a limitation might be made to take effect on the death of a person *in esse*, or the birth of a posthumous child; and alienation was not restrained for any longer time in *Stephens versus Stephens*; for, if a devise could hold to a posthumous child, there could be no alienation till he should attain the age of twenty-one. An obvious objection to the alternative in this case is, that, if the limitation over is a remainder, it cannot be turned into an executory devise. That is true, if it ever vest as a remainder. But here it might, or might not, upon a contingency; and it never did. 2. So in *Hopkins versus Hopkins*, lord Talbot decided in support of the intent, that a limitation which in one event would have operated as a remainder, but which event did not happen, should operate as an executory devise. This he did upon principle, without precedents; and a great estate is now held under his determination. 3. *Brownsword versus Edwards* in another strong instance, where it was held that a devise may operate either way according to the event. These are the authorities which go along with the principles I have stated, and enable us to support the intention of the testator. As to that, there is no doubt that he meant to give successive estates in tail male."

Judgement for the plaintiff.

Goodright, lessee of Hare, widow, against Cator and others.

Two points of real importance respecting real property having been settled by the judgement given by the court of King's Bench in this case, the jurisperit is advised not to rely solely on the deep learning discoverable throughout lord Mansfield's speech;

but to study the whole case attentively, as it is reported by Mr. Douglas, 460.

An estate being conveyed by a marriage-settlement to trustees, to the use of the settlor for *life*, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke *all* the uses in the settlement; and the settlor having granted an estate *for his own life* in the settled estate, a revocation subsequent thereto *of all the uses* by him, with the consent of the trustees, shall not affect the estate granted for his life—actual entry is not necessary, to take advantage by ejectment of a clause in a lease to re-enter for nonpayment of rent, it having been solemnly determined in the Common Pleas, while Willes chief justice presided in that court, that it is only necessary in the single case of avoiding a fine.

Lord Mansfield. “The defendant in this cause has turned the lessor of the plaintiff twice round upon former occasions, by objections in point of form. It would be very unfortunate, if he were to succeed a third time in a similar attempt. As to the *second* point; was an actual entry necessary in this case? I have always taken the distinction to be, that where entry is necessary to *complete the landlord's title* (as when a power to re-enter is reserved to him in case of non-payment of rent), there the confession of lease, entry, and ouster, is sufficient; but that, where it is requisite in order to *rebutt the defendant's title*, actual entry must be made. This is the case when a fine is to be avoided. In the case of *Dormer versus Fortescue*, which was much argued both here and in the House of Lords, I find the counsel could not state another instance where *actual* entry must be made. The clause of the statute of George the Second is very confused; but I think it meant only to provide a remedy in cases of vacant possession, although other matters are thrown in. My present opinion is, that actual entry was not necessary in this case. That, surely, could never be the intention of the parties, where the right of re-entry is expressly reserved, if a quarter's rent shall be in arrear for twenty-eight days. With regard to the *first* point, I cannot frame a doubt upon it. Undoubtedly lord Bolingbroke had a right to do what he did. It is a right which arises out of the nature of his estate. The question is, whether

ther the *same* lord Bolingbroke, who has made this demise for a valuable consideration, can be authorized to revoke it under any power in any settlement; for, by the power, the revocation must be executed by him. There is a gross fraud attempted in this case, either upon Cator, or on Mrs. Hare. If Cator did not know of the incumbrance, there was a fraud upon him. But it is found, that he did know of it; and therefore the fraud was upon Mrs. Hare. If the defendant's counsel can find any case of this sort, where actual entry has been held necessary, let them mention it to the court."

This day lord Mansfield, delivered the ultimate opinion of the court, as follows:

"We have looked very particularly into the cases for two hundred years back; and we find a great deal of contrariety on the question, whether an actual entry is necessary in order to maintain an ejectment, on a clause of re-entry, for non-payment of rent: but in the most distant period, the better opinion has been, that it is not. This was lord Hale's opinion, and is mentioned as such, and as that of lord chief justice Scroggs, by lord Holt, in the case of *Little versus Heaton*. But we look upon it as having been fully settled in 1703, by the opinion of all the judges upon deliberation and consideration of all the cases, that actual entry is only necessary to avoid a fine; and so the practice has been ever since. The reason of the thing is agreeable to the practice; for, it is absurd to entangle men's rights in nets of form without meaning: and an ejectment being a mere creature of the court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service. In the case of fines it is required by a positive rule of law, and clearly necessary under the statute of 4 Anne, cap. 16. I have a string of all the cases on this subject, but it would be very unentertaining and unnecessary to state them. Mr. Rous also contended, that a *demand* of the rent was necessary. There seemed to be some weight in that point, upon the reason of the thing; and, on looking into the cases, it appears to have a foundation in authority. But *here*, by the express terms of the lease, the demand is dispensed with. The act of 4 George II. is very perplexed; but the meaning certainly only is, that, where there is no stipulation in the lease for entry without demand, you may, notwithstanding, enter without demand, provided six months rent is in arrear, and there is not a sufficient distress; otherwise in such cases you must make a demand."

Judgement for the plaintiff.

An

An apology may be deemed necessary for deferring the introduction of Mr. Murray's masterly performance in an early part of his life to the year 1781. The following plain narrative is therefore submitted to the consideration of the curious reader.

Lord Mansfield, like many other men of genius of a lively and an active mind, was not very fond of reading or writing more than was absolutely necessary in the high lines of life in which he moved.

A celebrated rescript of his, drawn up in the duke of Newcastle's administration, and preserved to the world under the title of "The Duke of Newcastle's Letter, by his Majesty's Order, to Monsieur Michell, the King of Prussia's Secretary of the Embassy, in answer to the Memorial, and other Papers, delivered by Monsieur Michell to the Duke of Newcastle on the 23d of November and 13th December, 1752," is the principal public paper which remains; and which, as he frequently declared to his friends, was entirely his own composition, although it bears the signature of two distinguished civilians, and of his colleague in office, as well as his own.

He who runs may read, and soon be fully evinced that the younger Tully employed his talents, his ingenuity, and his industry, in every splendid part of this answer, which contains a complete investigation and justification of the principles adhered to by the court of admiralty in England in cases of capture of the ships and property of neutral powers in time of war.

The foundation and nature of the Prize Jurisdiction in the court of admiralty having been explained and elucidated by lord Mansfield in 1781, will be introduced, it is submitted, with great advantage, to the studious reader, and with great propriety, immediately after this concise and correct answer, which till very lately, was nearly out of print.

The

The Duke of Newcastle's Letter.

“ Sir,

Whitehall, Feb. 8, 1753.

“ I lost no time in laying before the king the memorial which you delivered to me on the 23d of November last, with the papers that accompanied it.

“ His majesty found the contents of it so extraordinary, that he would not return an answer to it, or take any resolution upon it, till he had caused both the memorial and the *Exposition des Motifs*, &c. which you put into my hands soon after by way of justification of what had passed at Berlin, to be maturely considered; and till his majesty should thereby be enabled to set the proceedings of the courts of admiralty here in their true light; to the end, that his Prussian majesty, and the whole world, might be rightly informed of the regularity of their conduct; in which they appear to have followed the only method which has ever been practised by nations where disputes of this nature could happen; and strictly to have conformed themselves to the law of nations, universally allowed to be the only rule, in such cases, when there is nothing stipulated to the contrary by particular treaties between the parties concerned. This examination, and the full knowledge of the facts resulting from it, will shew so clearly the irregularity of the proceedings of those persons to whom this affair was referred at Berlin, that it is not doubted, from his Prussian majesty's justice and discernment, but that he will be convinced thereof, and will revoke the detention of the sums assigned upon Silesia; the payment of which his Prussian majesty engaged to the empress queen to take upon himself, and of which the reimbursement was an express article in the treaties, by which the cession of that dutchy was made.

“ I therefore have the king's orders to send you the report made to his majesty upon the papers above mentioned by sir George Lee, judge of the prerogative court; doctor Paul, his majesty's advocate general in the courts of civil law; sir Dudley Ryder, and Mr. Murray, his majesty's attorney and solicitor general. This report is founded on the principles of the law of nations, received and acknowledged by authorities of the greatest weight in all countries; so that his majesty does not doubt but that it will have the effect desired.

“ The points upon which this whole affair turns, and which are decisive, are,

I i i

“ First,

“First, that affairs of this kind are, and can be, cognizable only in the courts belonging to that power where the seizure is made ; and, consequently, that the erecting foreign courts or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations in the like cases ; and therefore a proceeding which none can admit.

“Secondly, That those courts which are generally styled courts of admiralty, and which include both the inferior courts and the courts of appeal, always decide according to the universal law of nations only ; except in those cases where there are particular treaties between the powers concerned, which have altered the dispositions of the law of nations, or deviate from them.

“Thirdly, That the decisions in the cases complained of appear, by the inclosed report, to have been made singly upon the rule prescribed by the law of nations ; which rule is clearly established by the constant practice of other nations, and by the authority of the greatest men.

“Fourthly, That, in the case in question, there cannot even be pretended to be any treaty that has altered this rule, or by virtue of which the parties could claim any privileges which the law of nations does not allow them.

“Fifthly, That as, in the present case, no just grievance can be alleged, nor the least reason given for saying that justice has been denied when regularly demanded ; and as, in most of the cases complained of, it was the complainants themselves who neglected the only proper means of procuring it ; there cannot, consequently, be any just cause or foundation for reprisals.

“Sixthly, That even though reprisals might be justified by the known and general rules of the law of nations, it appears by the report, and indeed from considerations which must occur to every body, that sums due to the king's subjects by the empress queen, and assigned by her upon Silesia, of which sums his Prussian majesty took upon himself the payment, both by the treaty of Breslau and by that of Dresden, in consideration of the cession of that country, and which, by virtue of that very cession, ought to have been fully and absolutely discharged in the year 1745, that is to say, one year before any of the facts complained of did happen, could not, either in justice or reason, or according to what is the constant practice between all the most respectable powers, be seized or stopped by way of reprisals.

“ The several facts which are particularly mentioned above are so clearly stated and proved in the inclosed report, that I shall not repeat the particular reasons and authorities alleged in support of them, and in justification of the conduct and proceedings in question. The king is persuaded that these reasons will be sufficient also to determine the judgement of all impartial people in the present case.

“ It is material to observe upon this subject, that this debt on Silesia was contracted by the late emperor Charles the Sixth, who engaged not only to fulfil the conditions expressed in the contract, but even to give the creditors such farther security as they might afterwards reasonably ask. This condition had been very ill performed by a transfer of the debt, which had put it in the power of a third person to seize and confiscate it.

“ You will not be surprized, sir, that, in an affair which has so greatly alarmed the whole nation, who are entitled to that protection which his majesty cannot dispense with himself from granting, the king has taken time to have things examined to the bottom, and that his majesty finds himself obliged, by the facts, to adhere to the justice and legality of what has been done in his courts, and not to admit the irregular proceedings which have been carried on elsewhere.

“ The late war furnished many instances which ought to have convinced all Europe how scrupulously the courts here do justice upon such occasions. They did not even avail themselves of an open war to seize or detain the effects of the enemy, when it appeared that those effects were taken wrongfully before the war. This circumstance must do honour to their proceedings; and will, at the same time, shew, that it was as little necessary as proper to have recourse elsewhere to proceedings entirely new and unusual.

“ The king is fully persuaded that what has passed at Berlin has been occasioned, singly, by the ill-grounded informations which his Prussian majesty has received of these affairs; and does not at all doubt but that, when his Prussian majesty shall see them in their true light, his natural disposition to justice and equity will induce him immediately to rectify the steps which have been occasioned by those informations, and to complete the payment of the debt charged on the dutchy of Silesia, according to his engagements for that purpose.

“ I am, with much consideration, Sir,

“ Your most obedient humble servant,

“ HOLLES NEWCASTLE.

“ To the King’s most excellent Majesty.

“ May it please your Majesty,

“ In obedience to your Majesty’s commands, signified to us by his grace the duke of Newcastle, we have taken the memorial, sentence of the Prussian commissioners, and lists marked A. and B. which were delivered to his grace by monsieur Michell, the Prussian secretary here, on the 23d of November last; and also the printed *Exposition des Motifs*, &c. which was delivered to his grace the 13th of December last, into our serious consideration; and we have directed the proper officer to search the registers of the court of admiralty, and inform us how the matter appeared from the proceedings there, in relation to the cases mentioned in the said lists A. and B. which he has accordingly done.

“ And your Majesty having commanded us to report our opinion concerning the nature and regularity of the proceedings under the Prussian commission mentioned in the said memorial, and of the claim or demand pretended to be founded thereupon, and how far the same are consistent with, or contrary to, the law of nations, and any treaties subsisting between your Majesty and the king of Prussia, the established rules of admiralty jurisdiction, and the laws of this kingdom;

“ For the greater perspicuity, we beg leave to submit our thoughts upon the whole matter in the following method:

“ 1st, To state the clear established principles of law.

“ 2dly, To state the fact.

“ 3dly, To apply the law to the fact.

“ 4thly, To observe upon the questions, rules, and reasoning, alleged in the said memorial, sentence of the Prussian commissioners, and *Exposition des Motifs*, which carry appearances of objections to what we shall advance upon the former heads.

“ First, as to the Law.

“ When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other, upon the high seas: whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken, provided he observe his neutrality.

“ Hence the law of nations has established,

“ That the goods of an enemy on board the ship of a friend may be taken.

“ That the lawful goods of a friend on board the ship of an enemy ought to be restored.

“ That contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war is a departure from neutrality.

“ By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize.

Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding wherein both parties may be heard, and condemnation thereupon as prize in a court of admiralty, judging by the law of nations and treaties.

“ The proper and regular court for these condemnations is the court of that state to whom the captor belongs.

“ The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, *viz.* the papers on board, and the examination on oath of the master and other principal officers; for which purpose there are officers of admiralty in all the considerable sea-ports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn as enemy's property, or contraband goods going to the enemy, there must be an acquittal; unless from the aforesaid evidence the property shall appear so doubtful, that it is reasonable to go into the farther proof thereof.

“ A claim of ships or goods must be supported by the oath of somebody, at least as to belief.

“ The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction.

“ To enforce these rules; if there be false or colourable papers, if any papers be thrown overboard, if the master and officers examined *in præparatorio* grossly prevaricate, if proper ship's papers are not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend

or

or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated, by many treaties*.

“Though, from the ship’s papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect: if he will not shew the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

“If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties, who think themselves aggrieved, may appeal; and this superior court judges by the same rule which governs the court of admiralty, *viz.* the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them.

“If no appeal is offered, it is an acknowledgement of the justice of the sentence by the parties themselves, and conclusive.

“This manner of trial and adjudication is supported, alluded to, and enforced, by many treaties†.

“ In

* Treaty between England and Holland, 17 Feb. 1668. Art. 13.—Treaty 1 Dec. 1674. Art. 10.—Treaty between England and France at St. Germain, 24th of February, 1677. Art. 10.—Treaty of Commerce at Ryswick, Sept. 20, 1697, between France and Holland, Art. 30.—Treaty of commerce at Utrecht, 31 March, 1713, between Great Britain and France, Art. 29.

† As appears with respect to courts of admiralty adjudging the prizes taken by those of their own nation, and with respect to the witnesses to be examined in those cases, from the following treaties: Treaty between England and Holland,

“ In this method all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by courts of admiralty acting according to the law of nations and particular treaties, all captors at sea have immemorially been judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

“ Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and, where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations only governs so far as it is not derogated from by the treaty.

“ Thus, by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband-goods to the enemy; but particular treaties have enjoined a less degree of search, on the faith of producing solemn passports and formal evidences of property duly attested.

“ Particular treaties too have inverted the rule of the law of nations, and by agreement declared the goods of a friend on board the ship of an enemy to

Holland, 17 Feb. 1668. Art. 9 and 14.—Treaty 1 Dec. 1674. Art. 11.—Treaty 29th of April, 1689. Art. 12, 13.—Treaty between England and Spain, 23 May, 1667. Art. 23.—Treaty of Commerce at Ryfwick, 20 Sept. 1697, between France and Holland, Art. 26 and 31.—Treaty between England and France, 3 Nov. 1655. Art. 17 and 18.—Treaty of Commerce between England and France at St. Germain's, 29 March, 1632. Art. 5 and 6.—Treaty at St. Germain's, 24 Feb. 1677. Art. 7.—Treaty of Commerce between Great Britain and France, at Utrecht, 31 March, 1713. Art. 26 and 30.—Treaty between England and Denmark, 29 Nov. 1669. Art. 23 and 34.—Heineccius, who was privy-counsellor to the king of Prussia, and held in the greatest esteem in his treatise “*De Navibus ob vecturum vetitarum mercium commissis*,” cap. 2. sect. 17 and 18, speaks of this method of trial.

With respect to appeals or reviews,—from Treaty between England and Holland, 1 Dec. 1674. Art. 12, as it explained by article 2, of the treaty at Westminster, 6 Feb. 1715-16.—Treaty between England and France, at St. Germain's, 24 Feb. 1677. Art. 12.—Treaty of Commerce at Ryfwick, 20 Sept. 1697, between France and Holland, Art. 33.—Treaty of Commerce at Utrecht, 31 March, 1713. between Great Britain and France, Art. 31 and 32, and other treaties.

to be prize, and the goods of an enemy on board the ship of a friend to be free, as appears from the treaties already mentioned, and many others*.

“So likewise, by particular treaties, some goods reputed contraband by the law of nations are declared to be free.

“If a subject of the king of Prussia is injured by, or has a demand upon any person here, he ought to apply to your majesty’s courts of justice, which are equally open and indifferent to foreigner or native; so, *vice versa*, if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the king of Prussia’s courts of justice.

“If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

“The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the state, and justice absolutely denied *in re minimè dubiâ* by all the tribunals, and afterwards by the prince†.

“Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried.

“Secondly, as to the Fact.

“We have subjoined hereto two lists, tallying with those marked A. and B. which were delivered to his grace the duke of Newcastle by mons. Michell, with the said memorial, the 23d of November last; and also printed at the
end

* Particularly by the aforesaid treaty between England and Holland, 1 Dec. 1674, and the treaty of Utrecht between Great Britain and France.

† “Grotius de Jure Belli ac Pacis, lib. iii. cap. 2. sect. 4, 5.

Treaty between England and Holland, 31 July, 1667. Art. 31. Reprisals shall not be granted till justice has been demanded according to the ordinary course of law.

Treaty of Commerce at Ryswick, 20 Sept. 1697, between France and Holland, Art. 4. Reprisals shall not be granted but on manifest denial of justice.

end of the said *Exposition des Motifs*, &c. from whence it will appear, that as to the list A. which contains 18 ships and their cargoes,

4. " If ever taken, were restored by the captors themselves, to the satisfaction of the Prussians, who never have complained in any court of justice here.

1. " Was restored by sentence, with full costs and damages, which were liquidated at 2801l. 12s. 1d. sterling.

3. " Ships were restored by sentence, with freight, for such of the goods as manifestly belonged to the enemy, and were condemned.

4. " Ships were restored by sentence, but the cargoes, or part of them, condemned as prize or contraband, and are not now alleged in the lists A. or B. to have been Prussian property.

5. " Ships and cargoes were restored by sentence, but the claimant subjected to pay costs, because, from the ship-papers and preparatory examinations, there was ground to have condemned, and the restitution was decreed merely on the faith of affidavits afterwards allowed.

$\frac{1}{18}$ " Ship and cargo was restored by sentence upon an appeal, but, from the circumstances of the capture, without costs on either side.

" There need no observations upon this list. As to the eight cases first above mentioned, there cannot be the colour of complaint.

" As to the four next, the goods must be admitted to have been rightly condemned, either as enemy's property or contraband, for they are not now mentioned in the lists A. or B.

" If contraband, the ship could have neither freight nor costs, and the sentences were favourable in restoring the ships, upon presumption that the owners of the ships were not acquainted with the nature of the cargo or the owners thereof. If enemy's property, the ships could not be entitled to freight, because the bills of lading were false, and purported the property to belong to Prussians.

" The ships could not be entitled to costs, because the cargoes, or part of them, being lawful prize, the ships were rightly brought in.

" As the six remaining ships and cargoes were restored, the only question must be upon paying or not receiving costs, which depends upon the circumstances of the capture, the fairness of the ship's documents, and conduct of her crew; and neither the Prussian commissioners, the said memorial, or said *Exposition des Motifs*, &c. allege a single reason why, upon the particular circumstances of these cases, the sentences were wrong.

“ As to the list B.

“ Every ship, on-board which the subjects of Prussia claim to have had property, was bound to or from a port of the enemy; and many of them appeared to be, in part, laden with the goods of the enemy, either under their own or fictitious names.

“ In every instance where it is suggested that any part of the cargo belonged to a Prussian subject, though his property did not appear from the ship's papers, or preparatory examinations, which it ought to have done, sufficient time was indulged to that Prussian subject to make an affidavit that the property was *bona fide* in him; and the affidavit of the party himself has been received as proof of the property of the Prussian, so as to intitle him to restitution.

“ Where the party will not swear at all, or swears evasively, it is plain he only lends his name to cover the enemy's property, as often came out to be the case beyond the possibility of doubt.

“ It appears by a letter 29th of May and 9th of June, 1747, from Mons. Andrié to his Prussian majesty, exhibited in a cause, and certified to be a true extract by Mons. Michell under his hand, that this colourable manner of screening the goods of the enemy was stated in the following words:

“ Your majesty's subjects ought not to load on-board neutral ships any goods really belonging to the enemies of England, but to load them for their own account, whereby they may safely send them to any country they shall think proper, without any risk. Then, if privateers commit any damage to the ships belonging to your majesty's subjects, you may depend on full justice being done here, as in all the like cases hath been done.

“ List B. contains thirty-three cases.

2. “ Two of them never came before a court of justice in England, but (if taken) were restored by the captors themselves, to the entire satisfaction of the owners.

16. “ In sixteen of them the goods claimed by the Prussian subjects appear to have been actually restored, by sentence, to the masters of ships in which they were laden; and by the customs of the sea the master is in the place of the lader, and answerable to him.

14. “ In fourteen of the cases the Prussian property was not verified by the ship's papers, or preparatory examinations, or claimant's own affidavit, which he was allowed time to make.

$\frac{1}{33}$ “ And

“ And the other cause, with respect to part of the goods, is still depending, neither party having moved for judgement *. And, so conscious were the claimants that the court of admiralty did right, there is not an appeal, in a single instance, in list B.; and but one in list A.

“ Thirdly, to apply the law to the Fact.

“ The sixth question in the said *Exposition des Motifs*, &c. states the right of reprisals to be, ‘ *puisque on leur a si long tems denié toute la justice, qu’ils étoient fondés de demander.*’

“ The said memorial founds the justice and propriety of his Prussian majesty’s having recourse to reprisals, because his subjects ‘ *n’ont pu obtenir jusqu’à présent aucune justice des tribunaux Anglois qu’ils ont réclamés, ou du gouvernement auquel ils ont porté les plaintes.*’ And in another part of the memorial it is put ‘ *après avoir en vain demandé des réparations de ceux qui seuls pouvoient les faire.*’

“ The contrary of all which is manifest from the above state and lists hereto annexed.

“ In six of the cases specified, if such captures ever were made, the Prussian subjects were so well satisfied with the restitution made by the captors, that they never complained in any court whatsoever of this kingdom.

“ The rest were judged of by a court of admiralty, the only proper court to decide of captures at sea, both with respect to the restitution and the damages and costs; acting according to the law of nations, the only proper rule to decide by; and justice has been done by the court of admiralty so impartially, that all the ships alleged in list A. to have been Prussian were restored, and all the cargoes mentioned in either list, A. or B. were restored, excepting fifteen, one of which is still undetermined.

“ And, in all the cases in both lists, justice was done so entirely to the conviction of the private conscience of the Prussian claimants, that they have acquiesced under the sentences without appealing, except in one single instance, where the part of the sentence complained of was reversed;

“ Though the Prussian claimants must know that, by the law of nations, they ought not to complain to their own sovereign till injustice *in re minime*

* The Prussian has since applied for judgement on the 29th of January, and obtained restitution.

dubiâ was finally done them, past redress; and though they must know that rule of the law of nations held more strongly upon this occasion, because the property of prize was given to the captors, and ought therefore to be litigated with them. The Prussian who, by his own acquiescence, submits to the captors having the prize, cannot afterwards with justice make a demand upon the state. If the sentence was wrong, it is owing to the fault of the Prussian that it was not redressed. But it is not attempted to be shewn, even now, that these sentences were unjust in any part of them, according to the evidence and circumstances appearing before the court of admiralty; and that is the criterion.

“ For, as to the Prussian commission to examine these cases, *ex parte*, upon new suggestions, it never was attempted in any country of the world before: prize or not prize, must be determined by courts of admiralty belonging to the power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done his subjects in these courts, according to the law of nations, or particular treaties, where any are subsisting. If *in re minimè dubiâ* these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral state has a right to complain of such determination.

“ But there never was, nor never can be, any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way, with the approbation of all the powers at peace. Nay, the persons acting under this extraordinary and unheard-of commission from his Prussian majesty, do not pretend to say, that in the four cases of goods condemned here, for which satisfaction is demanded in list A. the property really belonged to Prussian subjects; but they profess to proceed upon this principle, evidently false, that though these cargoes belonged to the enemy, yet, being on-board any neutral ship, they were not liable to enquiry, seizure, or condemnation.

“ Fourthly, from the questions, rules, reasonings, and matters alleged in the said memorial, sentences of the Prussian commissioners, and *Expositions des Motifs*, &c. the following propositions may be drawn as carrying the appearance of objections to what has been above laid down:

FIRST PROPOSITION.

“That by the law of nations the goods of an enemy cannot be taken on-board the ship of a friend; and this the Prussian commissioners lay down as the basis of all they have pretended to do.”

ANSWER. “The contrary is too clear to admit of being disputed. It may be proved by the authorities of every writer of the law of nations; some of different countries are referred to *. It may be proved by the constant practice, antient and modern; but the general rule cannot be more strongly proved than by the exception which particular treaties have made to it †.

SECOND PROPOSITION.

“It is alleged that lord Carteret, in 1744, by two verbal declarations, gave assurances in your majesty’s name that nothing on-board a Prussian ship

* *Il Consolato del Mare*, cap. 273, expressly says, ‘the enemy’s goods, found on-board a friend’s ship, shall be confiscated.’ And this is a book of great authority.

Grotius de Jure Belli ac Pacis, lib. iii. cap. 1, Section 5, numero 4, in the notes, cites this passage, in the *Il Consolato*, and in his notes, lib. iii. cap. 6, Sect. 6.

Loccenius de Jure Maritimo, lib. 2. cap. 4, Sect. 12.

Voet de Jure Militari, cap. 5, nu. 21.

Heineccius, the learned Prussian before quoted, *de Navibus ob Vecturam vetitarum Mercium commissis*, cap. 2, Sect. 9, is clear and explicit upon this point.

Bynkershoek Quaestiones Juris Publici, lib. i. cap. 14, per totum.

Zouch (an Englishman) in his book *de Judio inter Gentes*, pars 2, Sect. 8. numero 6.

Treaty between Great-Britain and Sweden, 23 Oct. 1661. Art. 12 and 13; treaty between Great-Britain and Denmark, 19 Nov. 1669. Art. 2; and the passport or certificate, settled by that treaty, are material as to this point.

† Treaty between France and England, 24 Feb. 1677. Art. 8.

Treaty of Utrecht between France and England, 1713. Art. 17.

Treaty between England and Holland, 17 Feb. 1668. Art. 10.

Treaty between England and Holland, 1 Dec. 1674. Art. 8.

Treaty between England and Portugal, 10 July, 1654. Art. 23.

Treaty between France and the States General at Utrecht, 11 April, 1713. Art. 26.

should

should be seized, except contraband; consequently, that all effects not contraband, belonging to the enemy, should be free; and that these assurances were afterwards confirmed in writing by lord Chesterfield, the 5th of January, 1747."

ANSWER. "The fact makes this question not very material, because there are but four instances in lists A. or B. where any goods on-board a Prussian ship have been condemned; and no satisfaction is pretended to be demanded for any of those four cargoes in lists A. and B. However, it may be proper to shew how groundless this pretence is.

"Taking the words alleged to have been said by lord Carteret as they are stated, they do not warrant the inferences endeavoured to be drawn from them. They import no new stipulation different from the law of nations, but expressly profess to treat the Prussians upon the same foot with the subjects of other neutral powers under the like circumstances; *i. e.* with whom there was no particular treaty. For, the reference to neutral powers cannot be understood to communicate the terms of any particular treaty. It is not so said. The treaties with Holland, Sweden, Russia, Portugal, Denmark, &c. all differ. Who can say which was communicated? There would be no reciprocity: the king of Prussia does not agree to be bound by the clauses to which other powers have, by their respective treaties, agreed. No Prussian goods on-board an enemy's ship have ever been condemned here, and yet they ought, if the treaties with Holland were to be the rule between Great Britain and Prussia; nay, if these treaties were to be the rule, all now contended for, on the part of Prussia, is clearly wrong; because, by treaty, the Dutch, in the last resort, are to apply to the court of appeal here.

"Treaty of Alliance between Great Britain and Holland, at Westminster, the 6th of Feb. 1715-16, Article II.

"Whereas some disputes have happened touching the explanation of the twelfth article of the treaty marine in 1674, it is agreed and concluded for deciding any difficulty upon that matter, to declare by these presents, that by the provisions, mentioned in the said article, are meant those which are received by custom in Great Britain and the United Provinces, and always have been received, which have been granted, and always are granted, in the like case, to the inhabitants of the said countries, and to every foreign nation."

"Lord

“ Lord Carteret is said twice to have refused, in which Monsieur Andrié acquiesces, to give any thing in writing, as not usual in England.

“ Supposing the conversations to mean no more than a declaration of course that justice should be done to the Prussians in like manner as to any other neutral power with whom there was no treaty, there was no occasion for instruments in writing; because in England the crown never interferes with the course of justice. No order or intimation is ever given to any judge. Lord Carteret therefore knew that it was the duty of the court of admiralty to do equal justice, and that they would, of themselves, do what he said to Monsieur Andrié.

“ Had it been intended, by agreement, to introduce between Prussia and England a variation in any particular from the law of nations, and consequently a new rule for the court of admiralty to decide by, it could only be done by a solemn treaty, in writing, properly authorized and authenticated. The memory of it could not otherwise be preserved; the parties interested and the courts of admiralty could not otherwise take notice of it.

“ But lord Chesterfield's confirmation, in a letter of the 5th of January, 1747, being relied upon, the books of the secretary's office have been searched, and the letter to Monsieur Michell is found, which is *verbatim* as follows:

“ Monsieur,

A Whiteball, le 5 Janv. 1747-8.

“ Ayant eu l'honneur de recevoir les ordres du roy sur ce qui a formé le sujet du mémoire que vous m'avez remis du 8 de ce mois, N. S. je n'ai pas voulu tarder à vous informer, que sa majesté, pour ne rien omettre par où elle peut témoigner ses attentions envers le roy votre maître, ne fait nulle difficulté de déclarer, qu'elle n'a jamais eu l'intention, ni ne l'aura jamais, de donner le moindre empêchement à la navigation des sujets Prussiens, tant qu'ils auront soin d'exercer leur commerce d'une manière licite, & conformément à l'ancien usage établi & reconnu parmi les puissances neutres.

“ Que sa majesté Prussienne ne peut pas ignorer, qu'il y a des traités de commerce qui subsistent actuellement entre la Grande Bretagne & certaines états neutres, &, qu'au moyen des engagements formellement contractés de part & d'autre par ces mêmes traités, tout ce qui regarde la manière d'exercer leur commerce réciproquement à été finalement constaté & réglé.

“ Qu'en même tems il ne paroît point qu'aucun traité de la nature susdite existe à présent, ou a jamais existé, entre sa majesté & le roy de Prusse; mais que pourtant cela n'a jamais empêché que les sujets Prussiens n'aient été favorisés par l'Angleterre, par rapport à leur navigation, autant que les autres nations neutres: &, cela étant, sa majesté ne présuppose pas, que l'idée du roy votre maître seroit d'exiger d'elles des distinctions, encore moins des préférences, en faveur de ses sujets à cet égard.

“ Que de plus sa majesté Prussienne est trop éclairée pour ne pas connoître, qu'il y a des loix fixes & établies dans ce gouvernement, dont on ne peut nullement s'écarter; & que, s'il arrivoit que la marine Angloise s'avisât de faire la moindre injustice aux sujets commerçans du roy votre maître, il y a un tribunal ici, favoir, la haute cour de l'amirauté, à laquelle ils se trouvent en droit de s'adresser & de porter leurs plaintes; assurés d'avance, en pareil cas, qu'on leur y rendra bonne justice; les procédés juridiques de ladite cour étant & ayant été de tout tems hors d'atteinte & irréprochables; témoin, nombre d'exemples, où des vaisseaux neutres, pris illicitement, ont été restitués avec fraix & dommages aux propriétaires.

“ Voici ce que le roy m'a ordonné de vous répondre sur le contenu de votre dit mémoire; & sa majesté ne sauroit que se flatter, qu'en conséquence de ce que je viens d'avancer il ne restera plus rien à désirer au roy votre maître relativement à l'objet dont il est question; & le roy s'en croit d'autant plus assuré, qu'il est persuadé que sa majesté Prussienne ne voudroit rien demander que ne fût équitable.

“ Je suis, avec bien de la considération,

“ Monsieur,

“ Votre très humble & très obeissant serviteur,

“ CHESTERFIELD.”

“ Translation of the Earl of Chesterfield's Letter to Monsieur Michell.

“ Sir,

Whitehall, January 5, 1747-8.

“ Having had the honor to receive the king's orders upon the subject of the memorial which you delivered to me on the 8th instant, N. S. I would not delay informing you that his majesty, in order to omit nothing whereby he may shew his attention to the king your master, makes no difficulty in declaring, that his majesty has never had, or will have, any intention

tion to give any interruption to the navigation of the Prussian subjects, as long as they shall take care to carry on their commerce in a lawful manner, and conformably to the antient usage as established and acknowledged amongst neutral powers.

“ His Prussian majesty cannot be ignorant that there are treaties of commerce actually subsisting between Great Britain and certain neutral states, and that, by means of the engagements formerly contracted on each side by those treaties, every thing relating to the manner of reciprocally carrying on their commerce has been finally settled and regulated.

“ At the same time it does not appear that any such treaty exists at present or ever did exist, between his majesty and the king of Prussia; nevertheless that has never hindered the Prussian subjects being favoured by England, with respect to their navigation, as much as other neutral nations: and his majesty does not suppose that the king your master means to require distinctions from his majesty, much less any preferences, in favour of his subjects in this point.

“ His Prussian majesty is too well informed not to know that there are in this government fixed and established laws which cannot be departed from; and that, in case any English ships of war should commit the least injustice to the trading subjects of the king your master, here is a tribunal, *viz.* the high court of admiralty, where they have a right to apply and make their complaints; and they may be previously assured, that in such case impartial justice will be administered to them; the juridical proceedings of the said court being, and having ever been unimpeached and irreproachable, as appears by numerous examples of neutral vessels illegally taken having been restored with costs and damages to the proprietors.

“ This is the answer the king has ordered me to give upon the contents of your said memorial; and his majesty cannot but flatter himself that, in consequence hereof, the king your master's desire will be fully answered, with relation to the point in question; and of which his majesty is the more assured, as he is persuaded that the king of Prussia would not require any thing but what is equitable.

“ I am, with much consideration,

“ Sir,

“ Your most obedient, and most humble servant,

“ CHESTERFIELD.

“ There need no observations; it is explicit, and in exprefs terms puts Prussia upon the foot of other neutral powers with whom there was no treaty, and points out the proper way of applying for redrefs.

“ The verbal declarations made by lord Carteret in 1744, which are said to have been confirmed by this letter from lord Chesterfield, cannot have meant more than the letter expreffes.

“ And it is manifest by the above extract from Monsieur Andrié's letter to his Prussian majesty, that in May, 1747, Monsieur Andrié himself understood that goods of the enemy taken on board neutral ships ought to be condemned as prize.

“ It is evident, from authentic acts, that the subjects of Prussia never understood that any new right was communicated to them.

“ Before the year 1746 the Prussians do not appear to have openly engaged in covering the enemy's property.

“ The men of war and privateers could not abstain from captures in consequence of lord Carteret's verbal assurances in 1744, because they never were nor could be known; and there was no occasion to notify them, supposing them only to promise impartial justice. For, all ships of war were bound to act, and courts of admiralty to judge, according to the law of nations and treaties.

“ Till 1746 the Prussian documents were, a certificate of the admiralty, upon the oath of the builder, that the ship was Prussian-built; and a certificate of the admiralty, upon the oath of the owner, that the ship was Prussian property.

“ From 1746 the Prussians engaged in the gainful practice of covering the enemy's goods, but were at a loss in what shape and upon what pretence it might best be done.

“ On-board the ship the *Trois Soeurs* was found a pass bearing date at Stettin, the 6th of October, 1746, under the royal seal of the Prussian regency of Pomerania, &c. alleging the cargo, which was ship-timber, bound for Port L'Orient, to be Prussian property, and, in consequence thereof, claiming freedom of the ship.

“ Claiming freedom to the ship from the property of the cargo being quite new, the proposition was afterwards reversed. And on-board a ship called the *Jumeaux*, was found a pass bearing date at Stettin, the 27th of June, 1747, under the royal seal, &c. alleging the ship to be Prussian property, and, in consequence thereof, claiming freedom to the goods.

“ But this pass was not solely relied on ; for, there was also found on-board the same ship another pass, bearing date at Stettin, the 14th of June, 1747, under the royal seal, &c. alleging the cargo to be Prussian property.

“ And it is remarkable that the oaths upon which these passes were granted, appeared manifestly to be false ; and neither of the cargoes to which they relate are now so much as alleged to have been Prussian property in the said lists A. or B.

“ It being mentioned in the said “ Exposition des Motifs, &c.” that Monf. Michell, in September, 1747, made verbal representations to lord Chesterfield in respect to the cargo taken on-board the said ship called the *Trois Soeurs*, which was claimed as Prussian property, and no mention being made in lists A. and B. of the said cargo, we directed the proceedings in that cause to be laid before us ; where it appears in the fullest and clearest manner, from the ship-papers and depositions, that the cargo was timber, laden on the account and at the risque of Frenchmen, to whom it was to be delivered at Port L'Orient, they paying freight according to charter-party ; that the Prussian claimant was neither freighter, lader, or consignee ; and had no other interest or concern in the matter than to lend his name and conscience ; for he swore that the cargo was his property, and laden on or before the 6th of October, 1746, and yet the ship was then in ballast, and the whole of the cargo in question was not laden before May, 1747.

“ Several other Prussian claims had, in like manner, come out so clearly to be merely colourable, that Monf. Andrié, from his said letter the 29th of May and 9th of June, 1747, appears to have been ashamed of them.

THIRD PROPOSITION.

“ That lord Carteret, in his said two conversations, specified, in your majesty's name, what goods should be deemed contraband.”

ANSWER. “ The fact makes this question totally immaterial, because no goods condemned as contraband, or which was alleged to be so, are so much as now suggested to have been Prussian property in the said lists A. and B. ; and therefore, whether as enemy's property or contraband, they were either way rightly condemned ; and, the bills of lading being false, the ships could not be entitled to freight.

“ But if the question was material, the verbal declaration of a minister in conversation might shew what he thought contraband by the law of nations, but never could be understood to be equivalent to a treaty derogating from that law.

“ All the observations upon the other parts of these verbal declarations hold equally as to this.

FOURTH PROPOSITION.

“ That the British ministers have said, that these questions were decided according to the laws of England.”

ANSWER. “ They must have been misunderstood; for, the law of England says, that all captures at sea, as prize, in time of war, must be judged of in a court of admiralty, according to the law of nations and particular treaties, where there are any.

“ There never existed a case where a court, judging according to the laws of England only, ever took cognizance of prize.

“ The property of prizes being given during the last war to the captors, your majesty could not arbitrarily release the capture, but left all cases to the decision of the proper courts, judging by the law of nations and treaties where there were any; and it never was imagined, that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England.

FIFTH PROPOSITION.

“ That your majesty could no more erect tribunals for trying these matters than the king of Prussia.”

ANSWER. “ Each crown has, no doubt, an equal right to erect admiralty courts for the trial of prizes taken by virtue of their respective commissions; but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The only regular method of rectifying their errors is, by appeal to the superior court.

“ This is the clear law of nations; and by this method prizes have always be determined in every other maritime country of Europe as well as England.

SIXTH

SIXTH PROPOSITION.

“That the sea is free.”

ANSWER. “They who maintain that proposition in its utmost extent, do not dispute but that when two powers are at war they may seize the effects of each other upon the high seas, and on board the ships of friends; therefore that controversy is not in the least applicable upon the present occasion*.

SEVENTH PROPOSITION.

“Great Britain issued reprisals against Spain, on account of captures at sea.”

ANSWER. “These captures were not made in time of war with any power.

“They were not judged of by courts of admiralty, according to the law of nations and treaties, but by rules, which were themselves complained of in revenue-courts; the damages were afterwards admitted, liquidated at a certain sum, and agreed to be paid by a convention, which was not performed; therefore reprisals issued, but they were general. No debts due here to Spaniards were stopped; no Spanish effects here were seized; which leads to one observation more.

“The king of Prussia has engaged his royal word to pay the Silesia debt to private men.

“It is negotiable, and many parts may have been assigned to the subjects of other powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way, by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no enquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.

* This appears from Grotius in the passages above cited, lib. 3, cap. 1. § 5, No. 4. in his notes, and lib. 3, cap. 6, § 6, in his notes.

“This

“ This loan to the late emperor of Germany, Charles the VIth, in January 1734-5, was not a state transaction, but a mere private contract with the lenders, who advanced their money upon the emperor's obliging himself, his heirs and posterity, to repay the principal, with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay, demur, deduction or abatement whatsoever; and, lest the words and instruments made use of should not be strong enough, he promises to secure the performance of his contract in and by such other instruments, method, manner, form, and words, as should be most effectual and valid to bind the said emperor, his heirs, successors and posterity, or as the lenders should reasonably desire.

“ As a specific real security, he mortgaged his revenues arising from the Duchies of Upper and Lower Silesia for payment of principal and interest; and the whole debt, principal and interest, was to be discharged in the year 1745. If the money could not be paid out of the revenues of Silesia, the emperor, his heirs and posterity, still remained debtors, and were bound to pay. The eviction or destruction of a thing mortgaged, does not extinguish the debt or discharge the debtor.

“ Therefore the empress queen, without the consent of the lenders, made it a condition of her yielding the Duchies of Silesia to his Prussian majesty, that he should stand in the place of the late emperor in respect of this debt.

“ The seventh of the preliminary articles between the queen of Hungary and the king of Prussia, signed at Breslau the 11th of June, 1742, is in these words: ‘ *Sa majesté le roi de Prusse se charge du seul payement de la somme hypothéquée sur la Silésie, aux marchands Anglois, selon le contract signé à Londres le 7me de Janvier 1734-5.*’

“ This stipulation is confirmed by the ninth article of the treaty between their said majesties, signed at Berlin the 28th of July 1742.

Also renewed and confirmed by the second article of the treaty between their said majesties, signed at Dresden the 25th of December 1745.

“ In consideration of the empress queen's cession, his Prussian majesty has engaged to her that he will pay this money *selon le contract*, and consequently has bound himself to stand in the place of the late emperor in respect of this money, to all intents and purposes.

“ The late emperor could not have seized this money as reprisals, or even in case of open war between the two nations, because his faith was engaged to pay it without any delay, demur, deduction, or abatement whatsoever.

If

If these words should not extend to all possible cases, he hath plighted his honour to bind himself by any other form of words more effectually to pay the money; and therefore was liable at any time to be called upon to declare expressly that it should not be seized as reprisals, or in case of war; which is very commonly expressed when sovereign princes or states borrow money from foreigners. Therefore, supposing for a moment that his Prussian majesty's complaint was founded in justice and the law of nations, and that he had a right to make reprisals in general, he could not, consistent with his engagements to the empress queen, seize this money as reprisals: besides, this whole debt, according to the contract, ought to have been discharged in 1745. It should, in respect of the private creditors, in justice and equity, be considered as if the contract had been performed; and the Prussian complaints do not begin till 1746, after the whole debt ought to have been paid.

“ Upon this principle of natural justice, French ships and effects wrongfully taken after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property here during the war; because, had it not been for the wrong first done, these effects would not have been in your majesty's dominions. So, had not the contract been first broken by non-payment of the whole loan in 1745, this money would not have been in his Prussian majesty's hands.

“ Your majesty's guaranty of these treaties is entire, and must therefore depend upon the same conditions upon which the cession was made by the empress-queen.

“ But this reasoning is, in some measure, superfluous; because, if the making any reprisals upon this occasion be unjustifiable, which we apprehend we have shewn, then it is not disputed but that the non-payment of this money would be a breach of his Prussian majesty's engagements, and a renunciation, on his part, of those treaties.

“ All which is most humbly submitted to your majesty's royal wisdom.

GEO. LEE.

G. PAUL.

D. RYDER.

W. MURRAY.”

January 18, 1753.

1782.

Admiralty Jurisdiction.

The foundation and nature of the Prize Jurisdiction in the court of Admiralty, having been explained and elucidated by lord Mansfield in a very elaborate argument, on the 4th of February, 1782, when he delivered the opinion of the court in the famous case of *Lindo versus Rodney* and others.

The author is desirous, not only on account of its intrinsic merit, but also of its coincidence with, and confirmation of, many of the ingenious arguments in the duke of Newcastle's memorial, to impress on the mind of the jurisperit, that his lordship's speech, on that interesting occasion, cannot be too attentively considered. Mr. Douglas, in his Reports, p. 501 to 598, has inserted a very correct transcript of that important speech.

To trace the origin, nature, and jurisdiction, of the court of Admiralty over all matters of prize, and every thing consequential to a capture of prize, in the very neat, progressive, and convincing manner, in which it was done by lord Mansfield, must unavoidably proceed to lengths improper for, if not inadmissible in, a work of this nature.

Mitchell and another against Rodney and another.

A subsequent action * having been tried before lord Mansfield at the sittings after Hilary Term, 22 George III. and a special verdict found, upon which judgement passed the ensuing term without argument, the opinion of the court being known in the former cause, yet a writ of Error was brought in the House of Lords upon that judgement, and the reader is, we presume, prepared to hear that the judgement of the court of King's Bench was affirmed.

* Douglas, p. 598.

On the first day of January, 1782, Dr. Newton bishop of Bristol entered on the 79th year of his age. He reckoned himself to be the oldest Westminster scholar then living. He was older than the earl of Mansfield, and on the new year's day wrote the following note to his old friend and school-fellow.

“ My Lord,

St. Paul's, January 1, 1782.

“ Give me leave, at the coming in of the new year, to address your lordship with the old wish of *multos et felices*. I am happy to hear from all friends so good an account of your health; and I rejoice in it for the sake of the public as well as your own, your's being a life of the greatest consequence, an ornament and blessing to your country. Mine is but labour and sorrow, and I have often occasion devoutly to wish *Lord, now lettest thou thy servant depart in peace*. Never having been strong and healthy, it is no wonder, that, entering into the 79th year of my age, I bow under a load of growing evils. One that distresses me much came on very fast by my illness this last summer, the failure of my eyes to such a degree, that I can read and write very little by day-light, and not at all by candle-light with the help of any glasses. But amidst all my infirmities, God be praised, my spirits still bear me up. If they were to fail, I should be miserable indeed. I had the good fortune not to hear of lady Mansfield's illness, till I was informed of her recovery, which I hope continues as complete and perfect as it is reported to be. As long as I live I shall offer up my prayers for the health and happiness of your lordship and all your family; and I must cease to be myself before I can cease to be,

My Lord,

Your ever affectionate, obliged, and faithful humble servant.”

The bearer who carried this note returned with this obliging answer.

“ My dear Lord,

January 1, 1782.

“ A thousand thanks to you for your most friendly letter. We two are almost left alone. Thank God, I go down the hill without pain except for the public; and, if the Brest fleet and convoy are dispersed and driven back, this year opens propitiously. Lady Mansfield,

M m m

blessed

bleſſed be God, has had a miraculous recovery from a very ſudden and violent illneſs. Prudence on her account has kept me hitherto in town theſe holidays. I hope to be able ſoon to have the pleaſure of ſeeing you, and thanking you perſonally for your kind remembrance of

Your moſt affectionate, &c.

MANSFIELD."

The Biſhop, in another part of his anecdotes, has been pleaſed to obſerve,

" Lord Mansfield's is a character above all praiſe, the oracle of law, the ſtandard of eloquence, and pattern of all virtue, both in public and private life. It was happy for the nation, as well as for himſelf, that at his age there appeared not the leaſt ſymptom of decay in his bodily or in his mental faculties; but he had all the quickneſs and vivacity of youth, tempered with all the knowledge and experience of old age. Except the king's, no man's life was of greater importance and conſequence to his country, and wiſhing well to him was wiſhing well to all mankind. When his nephew lord Stormont had married, and had a fair proſpect of having children; he, with good reaſon, aſked and obtained an earldom for himſelf to deſcend to the male heirs. Upon which occaſion biſhop Newton, in the ſincerity of his heart, addreſſed to him the following letter :

" MY LORD,

Kew-Green, Oct. 20th, 1776.

" You have long merited the higheſt honours which this country can beſtow; but it was not fitting that they ſhould die with you: ſomething ſhould remain as a monument to poſterity. I beg leave therefore to congratulate your lordſhip, or rather my lord Stormont, upon your additional titles. Nothing can be properly an addition to yourſelf. You may rank higher in the world, but you cannot riſe higher in the opinion and eſteem of all who know you, and particularly of,

" My dear Lord,

" Your Lordſhip's ever affectionate and obedient ſervant."

" Soon after he was favoured with the following friendly answer :

" Mr

"MY DEAR LORD,

Kenwood, Oct. 22, 1776.

"I am exceedingly flattered by your letter, which I have just received; because I know the friendly sincerity of the heart from whence it flows. You do justice to my view in this creation. Lady Stormont is five months gone with child. If it please God to bless lord Stormont with issue male, I wish, from a pardonable vanity because common, that they may represent my name as their first title. The manner of conferring this mark did great honour, and consequently gave great pleasure to,

"Your most affectionate, &c.

MANSFIELD."

"The event was answerable to the good wishes and expectations of himself, his family, and friends; for at the beginning of March following lady Stormont was delivered at Paris of a son and heir to the title of earl of Mansfield *. Another son has been born since; and probably there may be more. The noble lord thus lives happy in himself, happy in his family *plenus annis, plenus honoribus, etiam illis quos recusavit*; and may he long, very long, continue thus! yet with all this worth, and all this excellence, greatly as he has been esteemed, and highly as he has been honoured in his life-time, his virtues will shine forth more illustrious, and his merits will be more universally allowed and applauded after his death. Envy will then be dumb, and faction be heard no more."

In 1784. The pressure of some bodily infirmities for the first time admonished the venerable peer to seek relaxation and relief from the salutary springs and the vivifying soft air of Tunbridge.

No sooner was he seated there, than he diffused life and spirit all around him. An accident in the ball-room would have been deemed too trivial for the pen of genius to portray, if it had happened to any common person; but on lord Mansfield's falling with lady Edward Bentinck from a bench in the

* Lord Chief Justice Mansfield was, by the first patent of an earldom, created earl of Mansfield in the county of Nottingham. This patent was extended to lady Stormont and her issue male by lord Stormont. The second included lord Stormont in the succession by the style and title of earl of Mansfield in the county of Middlesex.

ball-room at Tunbridge Wells, and losing his wig, a lady thus commenced her flight into the regions of fancy.

“Who would not think it perfect bliss

In such a gallant cause as this

With such a fair to fall?

How could a courtier be afraid?

When youth and beauty claim'd his aid

The sacrifice was small.

“Fair nymph! for thee, the rustic 'squire

Would leave his hounds; the bard his lyre,

His quill, and laurel-crown;

The monk would cease to count his beads;

The pilgrim throw aside his weeds,

The senator his gown.

“Mourn not, ye judges, when we tell

How from the bench earl Mansfield fell;

For, Justice thus replies:

“Without a wig, without a gown,

He still must equally be known

“Pre-eminently wise.

“Not to an outward form confin'd,

His bright, his comprehensive mind,

In every dress the same.

Diffuses o'er the world its ray,

And, keeping death and time at bay,

Glow with one steady flame.”

On the same. By Lady —*.

“When he, to whom Astræa gave her laws,

Became endanger'd by a trivial cause,

The goddess caught and sav'd the falling sage,

And bade his wisdom bless another age.”

* Supposed to be lady Burrell.

An Invocation to the Nymph of the Spring at Tunbridge-Wells,
on Lord Mansfield's having expressed an Intention of leaving
the place. By the same Lady.

“ Arise, fair Naiad ! from thy well ;
Arise, and tune thy vocal shell,
Try ev’ry soft bewitching art,
To charm the ear, and please the heart,
Till Mansfield shall thy voice obey,
And near thy spring consent to stay.
Sweetly warble in his ear,
“ Health, and all her train are here ;
Health, whose liberal hand bestows
Nights of undisturb’d repose,
Hours of social mirth and glee,
Days of soft tranquillity.’
Nymph ! at thy pellucid spring
Ruddy health delights to dwell,
Fanning, with her magic wing,
The mineral sparks that fill thy well,
And o’er the surface of the stream
Hope sheds her fascinating beam.
Bacchus, rosy god of wine,
Must to thee the palm resign.
His sweets nectareous may impart
A short-liv’d banquet to the heart ;
May dissipate the gloom of care,
And shield the sufferer from despair ;
May bid the slave forget his chains,
The exil’d wretch his native plains,
And by a transient joy suspend
The anguish of an injur’d friend.
Yet long the vision cannot last ;
With reason, sorrow’s force returns,
The dream of happiness is past,
The slave perceives his chain, and mourns.

Again

Again the lover feels his pains,
 Again the injur'd friend complains;
 The artificial spirits cease to blaze,
 And weaken'd nature rapidly decays.
 But thou, O nymph! can'st cheer mankind;
 Invigorate the drooping mind;
 Bid faded beauty re-assume
 Her sprightly grace, her roseate bloom;
 Give spirit to the languid eye,
 And banish from the breast dejection's sigh;
 While o'er thy sparkling fountain bends
 The wisest judge, the best of friends;

Nymph of the stream! indulgent heaven
 The grateful task to thee has given,
 To bid him from thy well receive
 The renovating draught, and live.
 Thy power has made those eyes benign
 With all their former lustre shine.
 Science and art no longer mourn,
 Again they see his health return,
 And hear his tuneful lips dispense
 The words of purest eloquence."

Answer to the Nymph of the Spring at Tunbridge-Wells, to
 the Invocation, written on Lord Mansfield's declared Inten-
 tion of leaving the Place. By a Gentleman.

" Say whence that voice, which thus so sweetly sings,
 Around the margin of my healing springs?
 Has any sister of th' harmonious nine
 Left fair Castalia's fount to visit mine?
 But, ah! not one of all the Muses' choir,
 Nor the soft warblings of a *Burrell's* lyre,
 Not all the various arts which mostly please,
 The bliss of friendship, and the love of ease,

Can longer here invite a Mansfield's stay ;
 The public welfare hastens him away.
 Enliven'd by my streams and purer air,
 Britannia's health is now his only care.
 ' And, lo ! Afræa, with a solemn call,
 Remands her fav'rite to her sacred hall,
 To poise again her scales with equal hand,
 And due obedience with her sword command,
 Whilst from his seat, with reverential awe,
 He speaks the oracles and voice of law.
 For such high duties heaven at first design'd
 The patriot sage, a blessing to mankind.'
 Thus spake the Naiad, from her wat'ry cell,
 And Mansfield bids, with wishful lingering look, farewell."

Verfes inscribed to Lord Mansfield; after his leaving Tunbridge-
 Wells, 1784. By a Gentleman of that Place.

" Whilst Mansfield here, as good as great,
 Adorn'd this healthful blest retreat,
 Our suns with brighter lustre shone,
 Our hours more chearfully pass'd on ;
 The Muses tun'd their sweetest song,
 And harmoniz'd the festive throng ;
 The loves and graces form'd the ball,
 And social pleasures gladden'd all.

But, since Afræa call'd away
 Her's and our pride, how dull the day !
 How chang'd the scene ! A silent gloom
 Shades ev'ry walk, and ev'ry room ;
 Forlorn, the nymphs and swains retire,
 And mute is *Burrell's* vocal lyre ;
 Our rural plains around all seem to mourn,
 And join the general prayer for his return."

IN many of the preceding pages, the author has endeavoured to delineate the *great outlines* of lord Mansfield's legal character; deducible from a proper temperature and illustration of history and ethics, which his lordship was accustomed to say were the true sources of all law. In attempting more than the great outlines of character he might have failed. In soaring higher he might have fallen: at all events he must have pervaded the wide regions of law and equity, in search of proper colouring for a perfect semblance. The work would have been voluminous, and he begs leave to add, in a great degree unnecessary, since it must be allowed, that a great *chief-justice* had the good fortune to engage three able reporters, Sir James Burrow, the right honourable Sylvester Douglas, and Mr. Cowper, in his service. To collect and bring into one point of view the innumerable traits of his illustrious legal character, the author has been obliged to hover, as it were, over many fair and fertile fields of legislation; whether with profit or pleasure to the reader is not for him to determine. If he has hitherto succeeded in two great objects, which ought never to be separated in contemplating illustrious characters; first, a sedulous endeavour to be useful in that sphere of life wherein it has pleased Providence to place us; and secondly, to promote emanations of gratitude for early patronage, which, like the radiant sun, sheds its influence far and wide, and, without losing any of its lustre, confers inestimable benefits on all who are under its benign influence.

The energy of this principle, duly cherished in the mind, has not failed to surmount many difficulties, to curb all inordinate love of lassitude, to overbalance the greatest disadvantages, and make whatever is in the direct line of duty not only the object of inclination, but of rational amusement.

Conscious that he has endeavoured to discharge a duty of some importance with fidelity and honest zeal, he will chearfully resign

the farther discussion of his lordship's character to abler hands : yes, a faithful transcript of his public character remains to be promulgated. The concurrent testimonies of modern writers have not been hitherto called in aid, the mellifluous treasures from their rich hives, remain to be collected.

“ To illustrate his oratory, by example, (says an ingenious modern writer,) would require voluminous transcripts from the records of parliament; and it is unnecessary, as we can appeal to living recollection.

“ However party-prejudices may adopt their different favorites, and each labour in detracting from the merit of the other, it is, we believe, generally understood, that precedence is allowed the earl of Mansfield, as the first magistrate that ever so pre-eminently graced that important station. The wisdom of his decisions and unbiaſſed tenor of his public conduct, will be held in veneration by the sages of the law, as long as the spirit of the constitution, and just notions of equity, continue to have existence. No man has ever in an equal degree possessed that wonderful sagacity in discovering chicanery and artifice, and separating fallacy from truth, and sophistry from argument, so as to hit the exact equity of the case. He suffered not justice to be strangled in the nets of form. His memory was astonishing. He never took notes; or, if he did, seldom had occasion to consult them *. His references to expressions which fell from him in the course of the debate, or his quotations from books, were so faithful, that they might have been said to have been repeated *verbatim*. The purposes to which he employed these amazing talents were still more extraordinary; if it was the weak part of his opponents arguments, that he referred to, he was sure to expose its fallacy, weakness, or absurdity, in the most poignant satire, or hold it up in the most ridiculous point of view. If, on the contrary, it were a point on which his adversaries laid their chief stress, he stated the words correctly, collected their obvious meaning; considered the force of the several arguments that had, or might have been, raised upon them, with a precision that would induce an auditor almost to suppose, that he had previously considered the whole, and that his speech was the result of much previous consideration.

* See Political Characters, p. 4. 1777.

“It may be said of Mansfield, as of Virgil *, that if he had any faults they might be considered in the same manner as those of some eminent fixed star, which, if they exist at all, are above the reach of human observation.

“The luminous æther of his life was not obscured by any shade dark enough to be denominated a defect. On account of his descent, local prejudices, and propensities, were imputed to him, and his conduct on that account examined with a microscopic eye: but the optic through which it was viewed possessed a party tinge, equally obvious and deceptive.

“His political principles were ever consistent, and to preserve consistency in such stations, and in such times as occupied the life of Mansfield, constitute an ordeal strongly impressive of virtue. It has been said that he wanted spirit. Is the uniform opposition of popular opinion, and apparently the contempt of it, any proof of the assertion? His spirited speech and his conduct in the affair of Wilkes’s outlawry, when popular prejudice ran in torrents, firmly illustrate each other.

“The lustre of his eloquence was something more than human, and the firm integrity of the judge was the emanation of a divinity. Here Demosthenes and Tully shrink from the comparison—here acknowledged superiority stands confessed—here the exulting Britain may exclaim,

“*Cedite, Romani—Cedite, Graii!*”

“He despised (to borrow an expression of his own) that mushroom-popularity, that is raised without merit, and lost without a crime. He disclaimed being the slave of popular impulse, or to acknowledge the shouts of a mob from the trumpet of fame.

“As a speaker in the House of Lords where was his competitor? The grace of his action, and the fire and vivacity of his looks, are still present to imagination, and the harmony of his voice yet vibrates in the ear of those who have been accustomed to listen to him. His lordship possessed the strongest powers of discrimination—his language was elegant and perspicuous, arranged with the happiest method, and applied with the utmost extent of human ingenuity—his images were often bold, and always just; but the character of his eloquence is that of being flowing, perspicuous, convincing, and affecting.”

* See Burton’s character of Classical Remains; tit. Virgil.

“ His genius (says a modern writer *) is comprehensive and penetrating ; and, when he judges it necessary, he pours forth sounds the most seductive, equally calculated to persuade and to convince. Among his rare qualifications (says he) ‘ may be added the external graces of his person, the piercing eye, the fine-toned voice, and harmonious elocution, and that happy arrangement which possesses all the accuracy and eloquence of the most laboured compositions.’ ”

Doctor Smollett, in the continuation of his History of England, in noticing the supporters of Mr. Pelham’s administration, mentions Mr. Murray as intitled to the first place in point of genius :

“ This gentleman,” he continues, “ the son of a noble family in North Britain, had raised himself to great eminence at the bar by the most keen intuitive spirit of apprehension, that seemed to seize every object at first glance ; an innate sagacity, that saved the trouble of intense application ; and an irresistible stream of eloquence that flowed pure and classical, strong and copious, reflecting in the most conspicuous point of view, the subjects over which it rolled, and sweeping before it, all the slime of formal hesitation, and all the intangling weeds of chicanery.”

Bishop NEWTON, who was Mr. MURRAY’s senior at Westminster, has, in his own Life and Anecdotes, prefixed to his works, given the following summary character of his school-fellow :

“ Lord Mansfield’s language was natural and easy ; his speeches were in a continued chain of reasoning, and sometimes with regular divisions, so that you easily accompanied him and comprehended the whole from the beginning to the end—what he said, as well as his manner of saying, was modest and decent, not presuming and dictatorial. He never descended to personal altercations, disdained to reply even to reflections cast upon himself, and in all things preserved his own dignity and that of the House of Peers. He addressed himself more to your reason than to your passions : he never courted popular applause so much as the approbation of the wise and good ; he did

* See Royal Register.

not wish to take you by storm or surprize, but fought to prevail only by the force of truth and argument; he had almost an immediate intuition into the merits of every cause or question that came before him, and comprehending it clearly himself could readily explain it to others; persuasion flowed from his lips, conviction was wrought in all unprejudiced minds, and for many years the House of Lords payed greater deference to his authority than to that of any man living."

Though last, not least in our esteem, is the delineation of character of this illustrious person, given by the present Bishop of WORCESTER, in the following eulogy:

"Mr. Murray, afterwards earl of Mansfield, and lord chief justice of England, was so extraordinary a person, and made so great a figure in the world, that his name must go down to posterity with distinguished honor in the public records of the nation; for, his shining talents displayed themselves in every department of the state as well as in the supreme court of justice, his peculiar province, which he filled with a lustre of reputation, not equalled perhaps, certainly not exceeded, by any of his predecessors.

"Of his conduct in the House of Lords I can speak with the more confidence, because I speak from my own observation. Too good to be the leader, and too able to be the dupe of any party, he was believed to speak his own sense of public measures, and the authority of his judgement was so high, that, in regular times, the house was usually decided by it. He was no forward or frequent speaker, but reserved himself, as was fit, for occasions worthy of him. In debate he was eloquent as well as wise, or rather he became eloquent by his wisdom. His countenance and tone of voice imprinted the ideas of penetration, probity, and candour; but what secured your attention and assent to all he said was his constant good sense, flowing in apt terms, and in the clearest method. He affected no fallies of the imagination, or bursts of passion; much less would he condescend to personal abuse, or to petulant altercation. All was clear candid reason, letting itself so easily into the minds of his hearers as to carry information and conviction with it. In a word, his public senatorial character very much resembled that of Messala, of whom Cicero says, addressing himself to Brutus, "Do not imagine, Brutus, that for worth, honor, and a warm love of his country, any one is comparable to Messala;" so that his eloquence, in which he wonder-

wonderfully excels, is almost eclipsed by those virtues: and even in his display of that faculty his superior good sense shews itself most; with so much care and skill hath he formed himself to the truest manner of speaking! His powers of genius and invention are confessedly of the first size, yet he almost owes less to them, than the diligent and studious cultivation of judgement.

“In the commerce of private life lord Mansfield was easy, friendly, and very entertaining, extremely sensible of worth in other men, and ready on all occasions to countenance and patronize it.”

So energetic, and so just are the tributes of respect and veneration, which have been spontaneously paid by eminent modern writers.

He retired in 1788 from the distinguished office of lord chief justice of the King's Bench, which he had held more than thirty years with a reputation and splendor unrivalled.

The very affectionate and pathetic address from the bar, signed by the counsel who had practised in the court of King's Bench during some part of the period of his presiding there, which was transmitted to him at Kenwood by Mr. Erskine, on his lordship's resignation of the high office of chief justice, was to the following effect:

“My Lord,

“It was our wish to have waited personally upon your lordship in a body, to have taken our public leave of you, on your retiring from the office of chief justice of England; but, judging of your lordship's feelings upon such an occasion by our own, and considering, besides, that our numbers might be inconvenient, we desire in this manner affectionately to assure your lordship, that we regret, with a just sensibility, the loss of a magistrate, whose conspicuous and exalted talents conferred dignity upon the profession; whose enlightened and regular administration of justice made its duties less difficult and laborious, and whose manners rendered them pleasant and respectable.

“But, while we lament our loss, we remember, with peculiar satisfaction, that your lordship is not cut off from us by the sudden stroke of painful distemper, or the more distressing ebb of those extraordinary faculties which
have

have so long distinguished you amongst men ; but, that it has pleased God to allow to the evening of an useful and illustrious life, the purest enjoyments which Nature has ever allotted to it. The unclouded reflections of a superior and unfading mind over its varied events, and the happy consciousness, that it hath been faithfully and eminently devoted to the highest duties of human society, in the most distinguished nation upon earth. May the season of this high satisfaction bear its proportion to the lengthened days of your activity and strength !”

To which address lord Mansfield, without detaining the servant five minutes, returned the following answer :

“ Dear Sir,

“ I cannot but be extremely flattered by the letter which I this moment have the honor to receive. If I have given satisfaction, it is owing to the learning and candour of the bar. The liberality and integrity of their practice freed the judicial investigation of truth and justice from many difficulties. The memory of the assistance I have received from them, and the deep impression which the extraordinary mark they have now given me of their approbation and affection, has made upon my mind, will be a source of perpetual consolation in my decline of life, under the pressure of bodily infirmities, which made it my duty to retire.

“ I am, Sir, with gratitude to you, and the other gentlemen,

“ Your most affectionate and obliged humble servant,

Kenwood, June 15, 1788.

“ MANSFIELD.”

In

In the six preceeding pages the author has indulged the desire and almost irresistible impulse of enriching this biographical work with the glowing tints of some celebrated modern writers, not only with a view to do greater justice to the original, to introduce traits of character vastly superior to any thing antecedently attempted, but also to evince that he has not furcharged his own picture with too much encomiastic coloring. He will now beg permission to resume his labours by an enumeration of familiar incidents in advanced age, and by a summary revision of this illustrious character.

The early maturity of Mr. Murray's mind procured him the friendship and patronage of those who were much older than himself, and the natural ease and vivacity of his conversation commanded the esteem of age and experience on the one hand, and the reverence of youth on the other, to a very late period of his life. Many instances might with facility be repeated, but the selection of a few will probably be deemed sufficient to illustrate this leading feature in the character of lord Mansfield. This less august yet endearing *trait* of a good and great man, "cheerfulness in old age."

Sir Thomas Parker, late lord chief baron of the Exchequer, whose name cannot be mentioned without profound respect, was one morning honored with a visit by the chief justice, and when in easy converse, talking about their venerable ages, Sir Thomas observed, your lordship and myself are not at *sixes and sevens*, but at *sevens and eights*. Lord Mansfield was in fact in his seventy-eighth year, and Sir Thomas in his eighty-seventh. The younger chief pleasantly turned the conversation by saying, "Poh! Sir Thomas, let you and I talk about the young ladies, and not dwell on old age."

Each of these venerable chiefs enjoyed in an uncommon degree, to a very advanced period of life, the greatest of all blessings: *Mens sana in corpore sano*. It may be deemed worthy of remark, that
each

each of them closed the scene of life in the eighty-ninth year of his age, and that if ever the animated picture of an Heathen philosopher, of the mind of a good man, was applicable to more than one, the open, intelligent, dignified, yet placid countenance of each of these chiefs, was respectively a fair index of the mind. “Si nobis animum boni viri, liceret inspicere, O quam pulchram faciem, quam sanctam, quam ex magnifico placeoquo, fulgentem videremus! Nemo illum amabilem, qui non simul venerabilem diceret.” Seneca.

A few years after lord chief baron Parker had resigned, and when he was on the verge of fourscore, not only full of years, but also happy in the enjoyment of a character, which he well deserved, that of an honest man, and an impartial judge. His successor, sir Sidney Stafford Smyth, being unable through ill-health to attend either in court, or at a meeting of the judges in Serjeants Inn, on the first day of term, when difficult cases referred to the consideration of the twelve judges are generally considered, lord Mansfield wittily observed, “that lord chief baron Smyth, the successor, should resign to his predecessor.” It is somewhat remarkable, that, about the same period of time, the late *lord Walsingham*, who was successor to *sir Eardley Wilmot*, as chief justice of the Common Pleas, was so frequently confined by the gout, and at last a martyr to it, as to have given propriety to the same observation—of resigning to his predecessor.

Of lord Mansfield's benevolent qualities, if a fair estimate is to be made from his patronizing merit wherever he found it, and where he had the least reason to think that his patronage would be of real service, his whole life will appear with great lustre, exhibiting a regular system of general benevolence, an unclouded effulgence of benignity, and an innate love of conferring favours on all those, who were zealous to obtain a good report, and who deserved it.

In his judicial capacity it may be affirmed, without partiality or encomiastic hyperbole, that his great outline of conduct as a judge was to make the rigid rules of law subservient to the purposes of substantial justice. He was not the first who, as some have erroneously alleged, softened the rigor of law, by the interposition of principles of equity. But, although he did not introduce novelty by this practice, candor must allow that he cultivated and improved this practice more successfully, and in a greater degree, than any of his predecessors. He presided in his high station during a period of thirty years and upwards, with the dignity of a great judge, and with an attachment to the court wherein he presided, which could not be dissolved by repeated offers of the custody of the great seal. In many emergencies, and in times of difficulty and danger, he discovered an intrepidity of mind, and delivered his sentiments with a decided tone of voice, which at once commanded admiration, and silenced the tongue of malevolence, not unfrequently apt to attribute to him the want of firmness.

His judgements were introduced with all the embellishments which the law on the subject, and which deep learning could supply. His great and unremitted attention, to improve and render plain and perspicuous the rules of the court wherein he presided, will be acknowledged and revered as long as the *rules themselves* or the love of *good order* shall exist in our excellent constitution. And, in fine, if he has left the practice of the highest court of judicature yet improvable, it must be allowed, that he has left the rules and orders of that court replete with so much excellence, that they cannot fail to prompt his successors to emulate him, and to make farther improvements.

In his invaluable and instructive letters to the late duke of Portland, on the study of antient and modern history, he recommends for the study of modern history, the best writers of the *History of France*, as the *Alpha*, of his study. It is therefore

less to be wondered, that the French *Revolution*, should have made a deep impression on his mind, at the very advanced age he had attained, when his friend and physician Dr. Turton attended him at Kenwood about this period. Here the physician was diverted from his attention to his patient's health by Lord Mansfield's turning the subject, and humourously saying, "instead of dwelling on an old man's *pulse*, let me ask you doctor, what you think of this wonderful *French Revolution*." The modest answer was, "it is more material to know what your lordship thinks of it."

Lord Mansfield, without the least interval of suspension, began :

"My dear Turton, how can any two reasonable men think differently on the subject. *A nation* which, for more than twelve centuries, has made a conspicuous figure in the annals of *Europe*. A nation where the polite arts first flourished in the Northern Hemisphere, and found an asylum against the barbarous incursions of the Goths and Vandals. *A nation* whose philosophers and men of science cherished and improved civilization, and grafted on the feudal system, *the best of all systems*, their laws respecting the descents and various modifications of territorial property. To think that *a nation* like this should, not, in the course of so many centuries, have learned *something* worth preserving, should not have hit upon some little *code of laws*, or a few principles sufficient to form one. Idiots! who instead of retaining what was valuable, sound, and energetic, in their constitution, have at once sunk into barbarity, lost sight of first principles, and brought forward a farrago of laws fit for Botany Bay! It is enough to fill the mind with astonishment and abhorrence! A constitution like this may survive that of an *old man*, but nothing less than a miracle can protect, and transmit it down to posterity!"

Their own celebrated M. de Montesquieu inculcated better advice. In speaking of Gothic government he observed,

"Il fut d'abord mêlé d'aristocratie & de la monarchie. Il avoit cet inconvénient que le bas *peuple* y étoit *esclave*; c'étoit un bon government qui avoit en foi la capacité de devenir meilleur." Lib. II. c. 8.

The defect in the old constitution was here clearly pointed out, and the allusion to a better constitution is too perspicuous to be silently passed over.

The inherent power of forming a third estate which our ancestors have happily and successfully exercised. The long and uninterrupted enjoyment of that vigorous, mixed, and better government, to which the author of the spirit of laws alluded, and which constitutes the *palladium* of our happy constitution, ought to be revered by every good citizen of the present generation, and by grateful *posterity*, as the greatest of all *blessings* !

The pleasing and unremitted attention of lord Mansfield to the happiness of his relatives, and to the comforts of his domestics, some of whom grew grey in his service, cannot be exhibited in a clearer or more pleasing light than in his will, dated the 17th of April, 1782, and in nineteen codicils, some of which consist only of two or three lines, and all of which were made from time to time through a period of twenty years, as occasion required.

We shall here find the noble superstructure of purity and excellence raised on the solid foundation of philanthropy, gratitude, and benevolence.

In his will, the great lord chief justice assumes a new character, with as much facility, as he divested himself of his legal robes; he seems to have laid aside every legal subtilty, every nice discrimination. He who had always been in the habits of deciding important questions, springing out of intricate devises, conditions, and contingencies, in wills. He who, with great accuracy and abilities, had been accustomed to circumscribe the bounds in limitations or bequests of real and personal property, by defining, like an all-seeing judge, "Thus far shalt thou go, and no farther." When the hour of sober reflection prompted him to sit down and make his last testament, he began piously and affectingly with the feelings of a Christian, and the simpli-

city of a scholar, "Whenever it shall please Almighty God to call me to that state to which, of all I now enjoy, I can carry only the satisfaction of my own conscience, and a full reliance upon his mercy, through Jesus Christ." Every idea of the intricate machine of a *divise-settlement* (as he was pleased to call it) was effaced from his mind, or lulled to a temporary repose. One leading feature alone predominates, pervades the whole, and marks the noble simplicity of plain, concise, and unfettered devises and bequests. If any comment on a will, which is as clear as the noon-day sun, can be pardoned, it is that only, which is plain, and so self-evident, that he who runs, may read.

Those who are dearest * and nearest to me best know how to manage and improve, and ultimately in their turn, to divide and subdivide the good things of this world, which I commit to their care, according to events and contingencies, which it is impossible for me to foresee, or trace through all the mazy labyrinths of time and chance.

To his other relations, whose lives had been in a great degree devoted to promote his happiness, whose sedulous care, and exemplary conduct were the solace of his old age, he is gratefully munificent. Of one, who through a period of forty years had served him with fidelity and zeal. The noble Donor, who best could tell, has enumerated many important services rendered at different and distant periods of his life, and thereby laid the foundation of remunerating them from time to time, in a style fully and forcibly expressive of gratitude and munificence. The manner of giving in these instances seems to have en-

* *Sic transit gloria mundi.* A few, very few, years flitted over the head of this dearest relative before he was, in his turn, not only called upon to exercise his discretion in obedience to the request of his venerable uncle, but also to pay the great debt of nature.

hanced the value of the gift, and to have at once reflected honor, on the giver and receiver.

In the various codicils to his will, all of his own hand-writing, as long as he was able to write, many fine instances might be enumerated, which could not fail to impress the reader with the deep sense of a discriminating and grateful testator. Suffice it to add, that the prominent feature of these numerous testamentary supplements seems to be, that of raising the different degrees and denominations of his faithful domestics, one degree, at the least, above servitude; since most of them who were single, have comfortable provision, by annuities, for their lives; and others, who were married, are enabled by specific donations to settle in business, or sit down contentedly with a decent competency. It is much to be lamented that the lustre of the finest parts is frequently tarnished by avarice in old age; yet the curious reader, by examining the will and codicils of the earl of Mansfield, will not from these premises, be induced to draw a conclusion, unfavourable to the cause of liberality, the calls of humanity, or the feelings of a grateful heart.

Some there are who will take away from, or divest testamentary donations of all kind of merit, on the score of a man's giving that to another which he cannot himself enjoy any longer. Characters like these, who are so thrifty of praise, will be disposed to ask, how did his lordship manage his ample fortune while he *lived*? To these, the author begs leave to answer—not in purchasing large domains—not in being a great stockholder; but in lending his money on real securities, or by way of mortgage, at *fair* and *moderate* interest. A declaration has frequently been ascribed to him, in the public prints, that when his guests expressed surprize that he did not buy more land, or speculate with his large fortune in the funds; his lordship, as has been asserted, answered:

“ The

“The man who buys land has principal without interest; while he who lays out his fortune in the funds has interest without principal.” But the author can, from the best authority, say, that his lordship disavowed his having made any such answer or declaration.”

The instances wherein he manifested his approbation of moderate interest on mortgages are not a little curious. Upon the same estate and in money-transactions with the same land-owner, he had sometimes, of *his own choice*, different rates of interest, for which he assigned the following reason: That he should deem it harsh to raise, in time of war, or national distress, an old mortgage to *five per cent.* but if the mortgagor was so bad a manager as to want more money at such a period, he must pay the interest of the day, that is, legal interest for it, although he paid less for the other. Thus a good old security was respectfully treated, like one of his good old servants!

But this is not all; many years ago application was made to him for the loan of a large sum of money to pay off a mortgage originally made by a nobleman to l—d W. M——, to the principal and interest of which his immaculate son J. M. esquire, of famous memory, became intitled. An introduction to the latter was of dangerous tendency, so accommodating and attentive was he at all times and seasons, “*Noctes atque dies patet atri janua ditis.*” His door instantaneously flew open, to relieve the wants and distresses of young men of fashion and large fortunes, whose prudence happened to be disproportionate to their fortunes, and who thought too favourably of the terms on which loans from this Gamaliel of goodness were obtained. In his own phrase he began with his young friends *gently*, in half and half, that is, by advancing half at legal interest, on good security, and the other on annuities at six or seven years purchase, which, on an *average*, produced a temporary income of *ten per cent.* or thereabouts. Many, too many, volatile and unthinking young men of family
and

and fortune have severely felt the dire effects of a corroding canker-worm of this nature. To relieve from such imminent danger lord Mansfield was, on this and various other occasions, generously disposed; but the Herculean task of subduing the *Gamaliel* J. M. who lamented that he was in danger of losing a fine harvest, remained to be accomplished. Requisition being made to him for a copy of the abstract of title to lay before lord Mansfield's counsel, introduced a conference between Mr. J. M. and his counsel perfectly novel.

The client anxiously desired an opinion of his counsel, how far the *law* would protect him in keeping his *iron-chest* locked, and in refusing to produce any evidence of title whatever, because such production would be injurious in the extreme to his future schemes of drawing on the young nobleman by degrees till he had got him completely into his *toils*.

The answer was, that no gentleman ever refused to comply with a requisition of that kind. "Sir, replied the client, you forget the question put to you. I ask you again and again, *how far will the law protect me in the refusal?*" Delighted with the answer, that the law would protect him, if he sat on his *iron-chest*, till the principal and interest was tendered to him, he withdrew, and determined to take his seat accordingly. So Richard, the son of the great usurper Cromwell, entertained himself privately at Hoddesdon in Hertfordshire, crying out, "Here I sit on the lives and fortunes of all the good people of England," meaning the addressees presented to Cromwell and himself.

The triumph of the mortgagee was not of long continuance. The curious conference in Lincoln's Inn between Mr. J. M. and his counsel having been related to lord Mansfield, he observed, with great seriousness and dignity, that he now saw more clearly the propriety and the merit of the efforts, to extricate the *borrower*, from the iron-hand, as well as the iron-chest, of the *lender*.

lender—that the counsel and friend of the former should not be disappointed, if he could, from his knowledge of the nobleman's situation, say, that the large sum might be safely advanced for a short period, on a *simple bond*, until a proper security could be prepared. Armed with this generous supply the parties met, the bank-notes were placed on the table, when the disappointed poor mortgagee objected to the tender; but, ultimately, on being told he might sit on his iron-chest, remain a prisoner in his own house till sterling coin from a banking house was produced and a legal tender made, the strong box was reluctantly opened; the title-deeds, with still greater reluctance, were restored; and in the act of restitution, the mortgagee seemed to cry, like the Moor in the Merchant of Venice, "Alas! Othello's occupation's gone!"

The merit of this signal service of the temporary loan of a large sum on bond was greatly enhanced by its being lent to a gentleman of whom lord Mansfield had very little personal knowledge. So the wine and oil administered to the wounded man in sacred history, who had the misfortune to fall among robbers, were more meritorious acts of beneficence, and, as it were, a miracle of mercy, by their having been conferred on a stranger.

In fine, The summary of lord Mansfield's legal and private character may be given in few words.

In all he said or did there was a happy mixture of good-nature, good-humour, elegance, ease, and dignity. His countenance was most pleasing, he had an eye of fire, and a voice perhaps unrivalled in its sweetness, and the mellifluous variety of its tones.

His intuitive and acquired knowledge of men and things soon attracted the attention, and procured the good opinion of the citizens of London and Westminster, so as to induce them to institute their suits of different denominations in the court wherein he presided.

His

He excelled in the statement of a case. One of the first orators of the present age said of it, "that it was of itself worth the argument of any other man." He divested it of all unnecessary circumstances; he brought together every circumstance of importance; and these he placed in so striking a point of view, and connected them by observations so powerful, but which appeared to arise so naturally from the facts themselves, that frequently the hearer was convinced before the argument was opened. When he came to the argument he shewed equal ability, but it was a mode of argument almost peculiar to himself. His statement of the case predisposed the hearers to fall into the very train of thought he wished them to take when they should come to consider the argument. Through this he accompanied them, leading them insensibly to every observation favourable to the conclusion he wished them to draw, and diverting every objection to it; but all the time keeping himself concealed, so that the hearers thought they formed their opinions in consequence of the powers and workings of their own minds, when, in fact, it was the effect of the most subtle argumentation and the most refined dialectic.

His legal knowledge and profound sagacity, not only promoted, but effectually secured, through a long series of years, that amazing increase of business in the court of King's Bench which dignified his high office, and diffused opulence among the different officers of his court, and all around him.

Considering his lordship's decisions separately, it will appear that, on all occasions, he was perfectly master of the case before him, and apprized of every principle of law, and every adjudication of the courts immediately, or remotely applicable to it. Considering them collectively, they will be found to form a complete code of jurisprudence on some of the most important branches of our law: a system founded on principles equally liberal and just, admirably suited to the genius and circumstances of

the age, and, happily blending the venerable doctrines of the old law with the learning and refinement of modern times; the work of a mind nobly gifted by nature, and informed with every kind of learning which could serve for use and ornament.

His great wisdom shed an uncommon lustre over his admonitions, his advice, and his decisions in the public courts, and gave them their due weight. All he said and did will be held in deserved admiration, as long as the love of our excellent laws, as long as the improvement of jurisprudence, and the power of eloquence, shall be deemed worthy of pre-eminence, or have any charms to please.

The author has not presumed to give his lordship's political character. More years must elapse, and party-prejudices be laid aside, before his abilities, principles, and actions as a statesman, can be properly appreciated. His eminence as a lawyer has been already stated, and universally acknowledged. He therefore begs leave briefly to confine himself to a few traits, which eminently distinguished his lordship in private life, where he shone, if possible, with greater lustre than in the more elevated departments of a statesman and a judge.

Few noblemen have had that happy method of combining dignity with wisdom, and liberality with frugality, equal to lord Mansfield. Every thing in and about his mansion had the appearance of splendor and plenty, without that show of ostentation and waste, which disgusts every sensible mind; and which, at the same time it gives an idea of the wealth, strikes us with the folly of the possessor. By his servants he was considered rather as a father and patron than a master: many of them lived with him so many years that they were fit for no other service; and peace, plenty, and happiness, were depicted in the countenance of every domestic. His lordship's charities, which were infinitely more extensive than is generally imagined, were given away and diffused with good sense and nobleness of mind rarely equalled; sixpences,

pences, shillings, and half-crowns, he seldom conferred, considering such sums as doing no real good, as the object so relieved would, on the day following the donation, be equally distressed as on the day preceding it; but, when by sums of ten or twenty guineas he could relieve the virtuous and necessitated from embarrassments by debt, by sickness, or otherways, and put them in a way to provide for themselves and families, he did it chearfully, and with that ease and good nature, which, instead of wounding, encouraged the feelings of the receiver, and always, if possible, with such secrecy and quietness as if he would not have his left hand know what his right hand did. Although his lordship's powers in conversation were uncommonly great, yet he never assumed a more than equal share of it to himself, and was always as ready to hear as he was to deliver an opinion. The faculty of conversing with ease and propriety he retained to the very last; and he was as quick at reply in his latter years as at any period of his life: whether he supported his own arguments, or refuted those of his adversary, his observations were delivered with that judgement and grace which evinced the precision of a scholar and the elegance of a gentleman. He was a sincere Christian without bigotry or hypocrisy, and he frequently received the sacrament, both before and after he ceased to leave home; and there was constantly that decorum, that exemplary regularity to be seen in every department of his household, which would have done credit to the palace of an archbishop.

Such were the virtues, such the endowments, and rare qualifications, which pervaded, cherished, and adorned his private life. These he sedulously cultivated and disseminated through a long life. How powerful was their coincidence, how happy their effects!

The late Mr. Madan, in a neat eulogy of four lines, has manifested his sense of the vigor of his lordship's mind on the verge of old age as well as in the meridian of life:

“ Inter mortales vetus est vox veraque sæpe

“ Bis sunt infantes, qui senuere semel ;

“ At te lustrantes juvenemque senemque fatemur

“ Te semel infantem, bis nituisse virum.”

The beautiful apostrophe of lord Monboddo, to which the author has alluded in the commencement of this work, remains to be placed in a proper light. The scientific lord of sessions having expatiated on the perfect model of eloquence, on which lord Mansfield formed a chaste and correct style of speaking, suitable to the business of a judge, to whom it belonged not only to determine controversies betwixt man and man, but to satisfy the parties that they have got justice, and thereby give ease and contentment to their minds ; and, having illustrated by a familiar example, within his own knowledge, that lord Mansfield was so successful in this respect, that even the losing party commonly acknowledged the justice of his decrees, the apostrophe thus commenced :

“ Having spent so many years of your life, more I believe than any other man of this age, in the administration of justice, with so much applause and public satisfaction, I hope, my lord, you will bear with patience and resignation the infirmities of old age ; enjoying the pleasure of reflecting, that you have employed so long a life so profitably in the service of your country. With such reflections, and a mind so entire as your's still is, you may be said to live over again your worthy life, according to the old saying :

“ — *hoc est*

“ *Vivere bis, vita posse priore frui.*”

“ That you may live this life as long as you retain a mind capable of enjoying it, and without pain of body, such as would disturb that enjoyment, is the earnest wish of all your friends, and of none more than the author of this work : for, in the midst of all your great public occupations, you have always found time to cultivate private friendship ; and I believe no man living has enjoyed more the two greatest pleasures of human life, ‘ that of loving and being loved.’”

Soon

Soon after the publication of Mr. Burke's celebrated book on the French revolution, lady Anne, then the honourable Miss Murray, asked a gentleman the meaning of the word *psephismata*, which occurs in the 305th page of that work, who replied, that he, in a hurry, as he rode along, had read it *sophismata*; but it was probably a word itself, which he did not immediately recollect. Lord Mansfield, having indistinctly heard the question, desired to know what the word was; and, upon being informed, said *psephismata* is right; but I do not at present recollect it; and then, without the least pause, said, I have it; and not only explained its meaning with critical accuracy, but quoted off hand a long passage from Demosthenes to illustrate it. His lordship was then in the 86th year of his age.

The following note, dictated by lord Mansfield, may be adduced in proof of his lordship's cultivation of private friendship, and of his astonishing retentive memory, in his 87th year:

"Lord Mansfield sends his compliments to Mr. —, and returns him many thanks for the perusal of his four letters; which are herewith returned: they very clearly shew the evil, and the remedy. If Mr. —'s other great business can permit him to act as a magistrate, the weight of his example will be a public blessing. Lord Mansfield thinks Mr. Justice Buller, upon the western circuit, gave an excellent charge to the effect of these letters."

But, alas! all the fair fame attendant on his powerful eloquence, which seldom failed to shed its lustre, and to give dignity to his legal character—all the serenity which sat upon his brow—all the complacency which beamed in his countenance and adorned private life—must now live only in the remembrance, in the grateful remembrance, of his friends—all the honors which he so justly merited, and long enjoyed—the sole reward, be it remembered, which he could be induced to accept from the fountain of all honour, must be transferred from his TEMPLES to his TOMB!

We

We are arrived at a period which is in general painful to relate—the last hours of a great man! or of a real friend! yet, when we calmly consider the very advanced age of lord Mansfield, and the whole tenor of his long life, we may fairly draw this conclusion, that for once *death* had lost its sting, and was no longer to him a *king of terrors*.

In many conferences with his friend and physician Dr. Turton, during the three or four last years of the earl's life, his lordship had observed, how hard it was, that an old man, on the verge of fourscore and ten years, could not be permitted to die quietly. To select a more striking instance, a few years before his decease, he lay for a time in a state of insensibility; by means of blisters, and other physical efforts, returning life enabled him to chide his physician, by asking a question equally uncommon and unexpected—"Why did you endeavour to bring me back when I was so far gone in my journey?"

Early in March, 1793, lord Stormont, having occasion to consult his uncle on a law-case then depending in the House of Lords, said his ideas and recollection were perfectly clear.

On Sunday, March the 10th, his lordship did not talk at breakfast as usual, but seemed heavy, and complained of being very sleepy, and his pulse was low; volatiles and cordials were ordered for him, and cantharides were applied to his issues. On the Monday he seemed rather better. On Tuesday morning he desired to be got up and taken to his chair; but soon wished to be put to bed again, and said, "Let me sleep—let me sleep." After this he never spoke. On his return to bed he seemed perfectly easy, breathed freely and uninterruptedly like a child, with as calm and serene a countenance as in his best health, and had a good pulse, but was clearly void both of sense and sensibility. A blister was applied to the arm, which it affected no more than it would any inanimate substance. Scotch snuff was inserted into the nostrils by means of a feather, without the least effect. Some attempts

attempts were also made to get nourishment down by means of a spoon, but to no purpose ; and, as the last attempt had nearly choaked him, it was desisted from, and his mouth was afterwards merely moistened by a feather dipt in wine and water. In this state his lordship continued without any apparent alteration, some symptoms of the vital spark remaining, yet glimmering faintly, till the morning of Monday the 18th, when there was an appearance of mortification on the part most pressed by lying, and his pulse began to beat feebly. Fears were now entertained that he should awake to misery, which he fortunately did not ; but continued to sleep quietly till the night of Wednesday the 20th, when the lingering dying taper was quite extinguished. He expired, without a groan, in the 89th year of his age ; closing a long life of honor to himself, and great use to society, in a way the most to be desired : and it may be said of his lordship, as it was of king David *, that he died in a good old age, full of days, riches, and honor.

His lordship, though never afraid of death, towards which he always looked with composure and confidence, was always afraid of suffering *pro forma*, as he expressed it ; and, a few years before his death, he, with great earnestness, exacted a solemn promise from the physician who attended him, that he would never unnecessarily torment him, but that, when he from experience should think his time was come, he would let him die quietly.

His lordship having paid every grateful tribute to Westminster-school in his life-time ; where he received his education, his profound respect for *alma mater*, dictated the direction in his will, that his remains should be deposited there ; and accordingly, on the 28th of March, about nine in the morning, he was entered in the same vault with his late countess, in Westminster-abbey.
Nil ortum tale !

* 1 Chron. xxix. 28.

The following grateful efforts tending to embalm the memory of this truly-great man deserve to be recorded :

Alexander Baillie, Esq. who some years ago left fifteen hundred pounds for a monument to the late earl (by whose superior professional abilities Mr. Baillie had become possessed of a considerable disputed property), left also a certain sum as a premium for the person who made the best inscription for it : whoever writes the epitaph for it should most peculiarly insist upon his lordship's having been the founder and author of the present system of commercial law in this kingdom. Our old law was framed when we had no commerce ; the venerable sage suited, as well as he could, the rules of it to our improved state of commerce ; and, when they could not apply, he, from the experience of merchants whom he consulted, and from his own sagacity, framed others. In the annals of history where shall we find two concurrent instances of this nature ?

An EPITAPH, by Mr. David Rees, stands at present in high estimation :

“ Sacred to the memory of
 WILLIAM MURRAY, earl of Mansfield,
 late Lord Chief Justice of England,
 who, during a course of thirty years and upwards,
 not only discharged the duties of that high office
 with unexampled assiduity
 and unquestionable reputation ;
 but, happily uniting
 the wisdom of Socrates,
 the eloquence of Cicero,
 the harmony of Virgil,
 and the wit and pleasantries of Horace,
 with the beauties of his own unbounded genius,
 became, and was confessedly,
 the brightest ornament of human nature
 that any age or country has hitherto

been

been able to boast of.

The venerable peer,
 having past the age of fourscore,
 and finding his corporeal powers too feeble
 much longer to display his
 wonderful talents
 with their wonted energy,
 withdrew himself from the bench,
 and, willing to appear with those talents
 undiminished at the throne of his

DIVINE CREATOR,
 by whom he had been so peculiarly and
 abundantly endued,
 shook off the clog of mortality
 in his 89th year:

And, as an eagle, wing'd his airy flight,
 Thro' death's pale shade and all-surrounding night,
 Up to the happy realms of everlasting light;
 Where, welcom'd by the social powers divine,
 Freely with them he drinks celestial wine;
 While here Philosophy remains to mourn
 Her favorite fled—fled never to return,
 Until his God shall, at the judgement-day,
 With his bright soul re-animate his clay,
 And both with him to dwell, from hence to heaven convey.”

Mr. Flaxman, jun. lately returned to his native country from Rome, is the fortunate artist to whom application has been made for a monument, pursuant to the directions for that purpose contained in the will of Mr. Baillie. This magnificent work is already in a great degree of forwardness. The bust of the noble earl, by Nollekens, in Trinity-Hall, Cambridge, having been much admired, the public will therefore receive, with pleasure, the additional information of a plaster-cast of this bust, being permitted to be taken, for the use of, and to raise laudable emu-

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lation in the breast of Flaxman, who will indisputably exert every effort of his chisel, and of genius, to make the three prominent figures of Lord Chief Justice Mansfield, of Wisdom, and of Justice, truly characteristic, animated, and worthy of the great design !

The following lines may possibly be deemed worthy of being inserted at the conclusion of the present work.

Near the fam'd dome where kings and princes sleep,
Here Murray sow'd the seeds of science deep ;
Wisdom with rapture saw her son preside,
The soul of Commerce, and the nation's pride :
While years revolving—meliorate the plan,
ASTREA, pleas'd, immortalized the man,
Effulgent in the realms of bliss to shine,
Pure emanation from the rays divine.

ADDENDA.

A D D E N D A.

IN the present biographical work, the desideratum of bringing to light the speech, made by Mr. Murray (his majesty's solicitor-general) before the lords in council in 1753, to which reference has been already made in page 103, and also the production of the literary curiosity of a sermon composed on a public occasion, not by a spiritual, but by a temporal lord, have probably been looked for with some anxiety by the curious reader. In consequence of very minute enquiries, and of some recent and liberal communications, not only from a noble family, but also from gentlemen in high official lines in general, and from Charles Butler, Esq. of Lincoln's Inn, in particular, the author feels a sincere satisfaction in not being under the disagreeable necessity of disappointing the reader's reasonable expectations.

On the first head of enquiry, he is bound, by every tie of gratitude, to make his best acknowledgements to a noble earl for another pleasing instance of his lordship's liberal spirit, who (as Mr. Hargrave has neatly and correctly observed in his preface to the 13th edition of the Commentary upon Littleton) "has ever distinguished himself as a zealous encourager of undertakings

takings having the least tendency to promote science and learning."

The papers wherewith the author has been very recently honored are inscribed, "An Account of the Enquiry in February, 1753, before the C— C— into the charge brought by lord Ravensworth against the Bishop of Gloucester (Johnson), Mr. Stone, and Mr. Murray, Solicitor-General."

They purport to have been committed to writing from memory by a nobleman, a near relation of the noble earl, who had seen all the papers relating to this affair. The exculpation of bishop Johnson having been correctly stated in the first division of this work * need not be resumed or repeated.

Mr. STONE was next admitted to make his defence, and had copies of examinations and letters which had been laid before the lords the preceding evening. He brought some observations in writing on the uncertainty and inconsistencies of Mr. Fawcett's evidence, and made a speech setting forth his steady loyalty and zeal in his majesty's service, for which he appealed to the noble duke †, under whose eye he had the happiness to spend many years of his life, and protested, that if it could be proved against him, that he had ever been present at the drinking of a treasonable health, within the compass of even thirty years, he would admit the whole charge. He produced as evidences in his favor Mr. Cazley (formerly consul at Cadiz, and a relation of Mr. Vernon) and the bishop of St. Asaph. They both swore that they did not believe Mr. Vernon to be a disaffected person, and gave him the character of a religious discreet man, who had taken the oaths to the government, and therefore incapable of such a behaviour as toasting disaffected healths.

* Vide antea, p. 103 and 104.

† The duke of Newcastle.

The last person who made his appearance, during the course of the enquiry, was Mr. Murray, who desired leave before the closing of it, to speak a few words for himself. The purport of his speech, which was expressed with elegance, and considered with care, was to represent himself as having been well affected to the present establishment, ever since he could think at all on the subject; that when he first went to Oxford he took the oaths to the government, and did it with seriousness. That, when he pleaded at the bar of the House of Commons, he had studiously professed the principles by which it is supported. That he had determined never to come into parliament but on whig connections, and in office, and that it was not to be supposed, that a person of sir John Strange's well-known loyalty would have resigned to him, if he had not been thoroughly convinced of his sincerity. That ever since he had been in the King's service he had got nothing by his employment (he spoke it not by way of complaint) but the ordinary perquisites of it, and had never recommended any friend of his own to preferment. That he had not been able to learn any objection to his conduct without doors, but the not having loaded the rebels with reproachful epithets, as if epithets would have added to their guilt. That he did not think such sort of language would be agreeable to his royal master, and that, had he been employed for the crown against sir Walter Raleigh, and that unfortunate person had been as guilty of high treason as the rebels, he would not have made sir Edward Coke's speech against him, for his estate. Mr. Solicitor concluded by acknowledging the indulgence of the lords in hearing him, and the justness and goodness of the king, who would not suffer his servants to be stabbed in the dark, but gave them an opportunity of clearing their innocence. He afterwards took his voluntary oath, as the others had done, and gave a particular answer to every part of the charge, denying that he had ever been present at Mr. Vernon's when treasonable healths were

were drunk, under any denomination, and that he believed him incapable of such behaviour.

Upon the whole matter the lords came unanimously to an opinion of reporting to the king, that there appeared to them no foundation for any part of the charge, and consequently that it ought not to affect the character of the bishop, or of either of the gentlemen who were aspersed by it.

In a comprehensive, analytical, and literary view, the acquisition of the heads of this celebrated speech is valuable, is great, yet the author has to regret that no industry, on his part, has hitherto been successful in procuring an authentic copy of the original. He does not, however, by any means despond. His success in recovering the sermon which, as a literary curiosity, is here subjoined, and the researches for which had long baffled all the repeated efforts of the late earl of Mansfield to recover, who was indefatigable in his researches for any document, which might reflect honor on the memory of his celebrated ancestor—an ancestor who had the misfortune to lose all his own original documents in the Riots of 1780. This, with other circumstances, induce him to hope, that, on some future occasion, the curious reader will not be disappointed, or deprived of the sight of this eloquent composition. Whether such future occasion may offer in the publication of a *Digest* of such other legal determinations of lord chief justice MANSFIELD, either in Westminster-Hall, or at Guildhall, in the sittings out of term, as can be procured, will depend on contingencies, which cannot at present be the subject of discussion.

The learned Dr. Jortin, at the end of his first volume of the Life of the great ERASMUS, has observed, *inter alia*, that remarks on all the works of ERASMUS, a collection of passages from his writings, and some epistles of him and of his correspondents, were reserved for *another volume*. This disposition and division of that correct work, first suggested the thought of arranging and forming

forming into a digest, numerous other determinations of lord Mansfield, which have not been the subject of arrangement or discussion in the present volume.

In revolving this distribution of the work in his mind, he had the satisfaction of finding, that the concurrent testimonies of antient writers were friendly to *Topics*, and in favour of *Digests*. To illustrate by example. ARISTOTLE, the great father of science in GREECE, in his elaborate composition on the use of TOPICS has taken his *principia* from PHILOSOPHY*, the *queen of science*.

CICERO, as is well known, at the solicitation of *Trebassius*, a Roman lawyer, has likewise left to the world, a valuable treatise on TOPICS, but he drew his PRINCIPIA from the fountains of CIVIL-LAW. Where shall we find the pendent of the *Civil Law*? Where the opinions of their antient lawyers? The general answer is: In the ROMAN DIGEST!

But although the manuscript epitome of a *digest*, tending to prove, that lord MANSFIELD, the great prototype of ERASMUS, for the improvement of legal knowledge, made ETHICS and the rules and maxims of LAW his PRINCIPIA: although the arrangement has already been a work of infinite labour, yet it is susceptible of great additions, of very considerable improvement; and, with great deference to the opinion of the public, he begs permission to suspend his labours; since, if the great leading features of an illustrious character, should not, by men of literature, be deemed, in some degree, interesting to the cause of science, useful to the law, and worthy of being farther promulgated, it will be decorous in, and the sincere wish of the author to desist from his

* Demosthenes likewise has told us, that he learnt philosophy from Plato in the groves of the academy, which he was known to frequent, and where Horace, as he informs us, learned his philosophy.

“Adjecere bonæ paulo plus artis Athenæ,
Scilicet ut possem curvo dignoscere rectum,
Atque inter sylvas academi quærere verum.” Epist. II. lib. II. v. 43.
labours,

labours, and leave to more skilful workmen, the superstructure of another volume, the foundation of which he has endeavoured to lay, but whether on fair and firm ground is not for him to determine.

At the conclusion of the Second Chapter, p. 277, the curiosity of the reader was awakened by intimation of a sermon having been composed by lord Mansfield for a FRIEND. Doctor Johnson, one of the under-masters of Westminster School, where he first cultivated the acquaintance of Mr. Murray, was that favorite friend. He was promoted to the see of Gloucester in 1752, and translated to that of Worcester, in 1759. David late earl of Mansfield was indefatigable in his enquiries for this unusual practice of piety in his venerable uncle. He often lamented that all his efforts had failed. Such a failure was not a little discouraging to new enquiries; yet, from the Journals of the House of Commons, it was clearly proved, that Dr. Johnson had not once preached before the Commons on the 30th of January or 29th of May. The Journals of the Upper House soon evinced that the bishop of *Gloucester* preached before the Lords the 29th of May, 1753, and that on the 29th of November, 1759, the bishop of Worcester by order of the Lords preached a thanksgiving-sermon at the abbey-church, Westminster. The future investigation was thus brought within a narrow compass. That the pious labours of lord Mansfield were employed on one of these two occasions was now very evident; and from the clear evidence of the entries, when any spiritual lord, on his translation to a new bishopric, took his seat in the House of Lords, the distress of bishop Johnson may easily be conjectured, since he took his seat, as bishop of Worcester, only a few days antecedent to the thanksgiving-day. The author can, with some propriety, if not certainty, conclude, that the new bishop, in describing his situation to his noble friend and patron, found in him a friend indeed, who kindly offered to relieve his distress, and to dictate a thanksgiving-sermon without farther pre-

preparation—*Si licet parva componere, &c.* In the year 1770 Edward duke of Norfolk was desirous of obtaining an act for the better endowment, regulation, and enlargement of Sheffield hospital. On the morning of the last day for presenting petitions for private bills, the noble duke's petition was not prepared. The author of these sheets was commissioned to wait on lord Mansfield, and to request that his lordship would be pleased to present a petition from the duke of Norfolk in a few days for leave to petition the house after the day limited for receiving petitions, by reason that a regular petition could not be prepared in due time. The reply was, "Why travel over all this ground, since to assist the duke of Norfolk in so good a work, the petition itself may be dictated and prepared in less than half an hour. In consequence of this advice, it was accordingly done. In the bishop's case, the fact is well authenticated, that his lordship wrote what lord Mansfield dictated in walking up and down the room. The judicious reader will form his own judgement, not only of the numerous fine illustrations from the sacred writings, worthy of the great Dr. Clarke himself, but also of several short sentences in the sermon of the syllogistical kind, a mode of reasoning, which was peculiarly familiar to lord Mansfield, and which strongly indicates, that, although in the composition of it the hand was the hand of *Esau*, yet the voice was *Jacob's* voice.

In a quarto volume of between forty and fifty occasional sermons, collected by bishop Newton, with a curious index made by himself, this sermon was fortunately found, intituled, "A Sermon preached before the Right Honorable the Lords Spiritual and Temporal in Parliament assembled, in the Abbey-church Westminster, on Thursday, November 29, 1759, being the Day appointed to be observed as a Day of General Thanksgiving to Almighty God for the signal Successes with which his Majesty's Arms have been blessed. By James Lord Bishop of Worcester."

R r r

Dan.

Dan. ii. 20.

“ Blessed be the name of God for ever and ever : for, wisdom and might are his.

“ The prophet Daniel, upon a *view* that was given him by the Almighty of the great revolutions that were to happen in the kingdoms of the earth, breaks forth into this strain of thanksgiving—*Blessed be the name of God for ever and ever : for, wisdom and might are his.*

“ And shall *we* upon *experience* of the many signal, and repeated mercies which this nation has received at the hand of God, not *lift up* our voice of praise and thanksgiving to the Most High, *who ruleth in the kingdoms of men**, and *divideth to nations their inheritance*† ?

“ We are here assembled to shew our just sense of these mercies ; which must depend upon the truth and effect of our notions of the government of a Being, of infinite wisdom, power, and goodness, who holds, disposes, and controls all things.

“ If we are fully and vitally influenced by this persuasion, we shall make a proper application of it to our own breasts upon every important occasion.

“ Every part of the creation has the mark of God’s power impressed upon it, and bears evident testimony to it. War itself is an acknowledgement of the power of God, as it is an appeal to him for a decision of the rights of nations, which have no superior upon earth to whom they can make appeal. His hand directs the events of battles, and the revolutions of empires—and vain are the efforts of man to oppose or obstruct the course of his Providence. *He doth according to his will in the*

* Dan. iv. 32.

† Deut. xxxii.

*army of heaven, and among the inhabitants of the earth, and none may stay his hand, or say unto him, what doest thou *?*

“As his power is unlimited, the methods by which it is administered are various, and *all* conspire to the illustration of his greatness, and to the advancement of the general happiness of mankind; however his purposes, in the execution of them, may surpass the reach of our comprehension.

“The most memorable and decisive events recorded in history have seldom answered the previous determinations of human prudence.

“Unforeseen circumstances give a different turn and direction to the best-formed plan of operations—*I returned, saith the wise man, and saw, under the sun, that the race is not always to the swift, nor the battle to the strong †.*

“It is God that giveth the victory.

“Fleets and armies are but the instruments of his Providence. And *that power*, which can set bounds to the boisterous element, and say unto it, *hitherto shalt thou come, and no farther, and here shall thy proud waves be stayed**—can most certainly control any enterprize, the success of which must, in a great measure, depend upon that very element.

“Thus, in the days of our forefathers, did God disperse a terrible fleet, the threat and preparation of many years: and perhaps for that very reason, because it vainly boasted itself *invincible*. The word of the Lord went forth, and the storms and tempests were ready to fulfil it, and to scatter the proud in the imagination of their hearts.

“The same Providence, propitious to the liberties, and the happy constitution of this country, in the next century, gave a

* Dan. iv. 35.

† Eccl. ix. 11.

‡ Job xxxviii. 11.

prosperous course to a fleet, set out for the deliverance of these kingdoms from arbitrary power, superstition, and slavery.

“ May we, in the present important crisis, which must fill every heart with the most anxious expectation, experience the same favourable interposition of the Almighty. *His hand is not shortened, that it cannot save—neither his ear heavy, that it cannot hear**.

“ Every age can supply us with instances of the Divine Power, exerted in an extraordinary manner, as so many public monuments, to convince the profligate, upon whom the more silent evidences of that power have no influence.

“ Upon these occasions, second causes are over-ruled, and important events brought *about*, which no human foresight could have discerned, which no counsel of man could have devised.

“ All history is full of examples of this truth, the Jewish in particular. And though that people was under a *particular* providence, and a *peculiar* administration; yet, if *that* method of God’s proceeding with the Jews, as a nation, had not been founded in reason and justice, it could never have been established by a God of truth and righteousness. And therefore, examples from that history, so far from losing any part of their force, upon account of a particular Providence, are, upon *that very* account, of greater weight and authority.

“ We may observe, throughout their whole history, that, whenever they acted in obedience to God, the weakest instruments prevailed—whenever they were disobedient or rebellious, they were defeated by *men*, every way inferior to them, in force, in number, in military skill. Their national glory and reputation *always* sunk as their idolatry and irreligion prevailed, and *revived* by their repentance and reformation.

* If. lix. i.

“ Is not this great Babylon, that I have built, for the house of the kingdom, by the might of my power, and for the honour of my majesty? was the proud vaunt of Nebuchadnezzar.—But, while the word was in his mouth, there fell a voice from heaven, saying, the kingdom is departed from thee.*

“ Instances of this kind, in the gospel, are more private and familiar.—The presumptuous rich man, who thought he had goods laid up in store for many years, and was enlarging his barns for their reception, was soon fatally convinced of his error, in placing his dependence upon his wealth and power—that night his soul was required of him †.

“ These unhappy consequences of security and confidence (which, in some degree, will affect every individual, and every nation, under the same circumstances) must remind us, for whose admonition these things are recorded, not to think of ourselves more highly than we ought to think, but to think soberly ‡.—They will shew us in the strongest light, where, and where only, our true dependence lies; not in human power, not in numerous fleets and armies, however well appointed, but in the superior protection and assistance of the Almighty.—God is our hope and strength, therefore shall we not be afraid ||.

“ We have happily experienced his protecting power and goodness, in such a series of mercies, so quickly succeeding each other, as is hardly to be paralleled in any history.—But mercies lose their effect, if they direct not our thoughts to the hand from which they came.

“ A devout and grateful mind recollects, and, dwells upon them with satisfaction and delight—and, while it pays the debt of gratitude, renews and quickens the enjoyment of the blessings themselves, by frequent reflection, and constant acknowledgments :

* Dan. ii. 30.

† Luke xii. 20.

‡ Rom. xii. 3.

|| Ps. xlv. 1, 2.

sensible of its own weakness and insufficiency, it looks up to the Father of Mercies with humility and thankfulness—it considers extraordinary favours as the kindest admonitions, and encouragements to extraordinary gratitude and obedience.—The tribute of praise and thanksgiving is the *least* return we can make. And, though our praises and thanksgivings cannot add any thing to *his* glory who sitteth on his throne in the highest heavens, yet, as they are the natural means of shewing our gratitude, of acknowledging our dependence, they are well-pleasing in the sight of God, who *accepteth according to that a man hath, and not according to that he hath not**.

“Gratitude to benefactors is *indeed* a duty acknowledged by all the world. And he must be entirely void of every virtue, who is not disposed to make suitable returns or proper acknowledgments for favours received.—But public and national benefits require from us a more solemn sacrifice. The mere formality of a thanksgiving can never satisfy our obligation in this point. They require the substantial returns of public virtue and national piety.

“Blessings bestowed upon societies of men, not only claim our acknowledgments to God, but call for a *particular* exercise of our *social* virtues.—They remind us *strongly* of our duty to our fellow-creatures, and exhort us to imitate, as far as lies in our power, *that goodness*, for which we praise the Lord; by communicating and diffusing our happiness; by administering to the necessities of the poor, and to the comfort of the afflicted.—That we may be perfect, *as our Father which in Heaven is perfect*†.

“The exercise of *this* virtue, in *general*, is enjoined to us by our Saviour with a more than common earnestness. And it seems in a peculiar manner to be expected from us, when our

* 2 Cor. viii. 12.

† Mat. v. 48.

hearts are enlarged with the sense of benefits received, and when the extraordinary motives to gratitude and affection are most strongly impressed upon us.—*If God hath so loved us, ought not we also to love one another**?

“The love of God and the love of man are so closely connected together, that the *one* is a proof and a *test* of the *other*. We have *no* means of shewing our love to God so effectually as by shewing it, where he has directed us to shew it, to our distressed neighbour.

“Success, if not rightly improved, may, in its consequences, be hurtful. If it turns men’s minds from religious reflection—if it fills them with flattering objects, and makes them less attentive to the consideration of the great purposes of God’s providence, and to the salutary ends of its dispensation—if it makes us appropriate to *ourselves* the favour of God, as the reward of our *own* merits—if it gives occasion to intemperate excesses, to riot and debauchery, or to unwarrantable and presumptuous expectations for the future, we may have reason to repine at our prosperity, and the public may feel the unhappy effects of it.

“The very instability of human affairs may, to a wise man, give occasion to apprehension rather than confidence. All the operations of war particularly, however well concerted, are liable to the greatest uncertainty in the execution. And neither past or present successes can insure to us the like advantages for the future. We may have yet great dangers to encounter; and should endeavour, by a right use of the mercies which we have received, to prevent those miseries and calamities, which, should they come upon us, might overwhelm us. If we examine our own hearts, we may have reason rather to apprehend the severity and judgments of God than to expect a continuance of the mercies we have lately experienced. And, if the Lord should turn away

* Joh. iv. 11.

his face from us, and withdraw the light of his countenance, what support could we have? It is therefore of the utmost consequence to us, upon every consideration, to prepare and to guard our minds against the ill consequences of prosperity. It is a part of the religious duty of this day. And nothing can more contribute to this good purpose than a serious attention to the words of the prophet, *that wisdom and might are of God.*

“ They are *inherently* and *essentially* his. And, whatever degrees of *these* are given to *man*, they flow from that great fountain of light and beneficence; and are intended to be subservient to his glory.

“ The most important use of them, is to discover to us the knowledge of God, and the several manifestations of his will, and to animate us to such a lively faith in him, and such an active obedience to his precepts, as may conciliate his favour and loving kindness. God’s grace and assistance is not promised but to the endeavours of men. It co-operates with them in every good purpose, and every virtuous undertaking. And as our wisdom and power will most certainly be defeated, if we entirely rely upon them, and leave the providence of God out of the question: So, if we rely upon Providence, without exerting those talents which God has graciously entrusted to us, all our hopes will be ineffectual.—It is therefore our duty to labour after the attainment of such *wisdom* as is agreeable to our own nature and to the will of God; and to exert such might as our natural abilities, situation, circumstances, and condition of life, afford; always remembering that the Lord is king. Every one’s own conscience must dictate to him the proper application of the talent committed to his trust. Every one must feel his own powers, and every one must answer for the neglect or abuse of them.

“ This principle, and the obligation we lie under of making this improvement, applied to every one’s own heart, will extend to all ranks and conditions of life. Power, thus employed, as it is

is the consequence of virtue, and connected with it, is the natural means of happiness, and becomes a common blessing. Mankind looks up to it with reverence, and obeys it with satisfaction.

“ Even power *Almighty*, according to our *best* idea of it, is originally founded, and continually exercised in beneficence. The end of God’s moral government is universal happiness, and his laws are the laws of truth and righteousness.

“ A steady obedience to these laws has been found by the experience of all nations, and all ages, to be the most effectual means of securing to us the favour of the Lord of Hosts, the God of Battle; and of giving us repeated occasions of commemorating the mercies of God, and of shewing forth his salvation from day to day.

“ While we offer up our most solemn thanks to God, from whom every good and perfect gift cometh; while we praise him for his goodness, and declare the wonders that he doth for the children of men; it will become us to pay our subordinate acknowledgements of duty and affection to him, whom God has made the chosen instrument of his Providence to these kingdoms. May that God, *whose Providence he devoutly adores in these his dispensations*, give him a farther increase of glory and happiness, by fresh advantages over his enemies; and, in his own good time, crown these important successes in war, and *complete this happiness*, by making him the instrument of securing and establishing to us the solid and substantial blessings of peace. And may the happiness we enjoy by his government be perpetuated to us, under his family, to the latest posterity! The happiness which we enjoy is great.—Success abroad, though the most striking, is not the most important part of it.

“ If we consider the miserable and desolate condition of those countries, which have been the more immediate seats of war; the various scenes of distress, which will occur to our thoughts, upon *this reflection*, will shew us the happiness of our own situation,

S f f

who

who, in many respects, have enjoyed, amidst the calamities of war, the most valuable blessings of peace. And while a spirit of uncommon zeal, and unanimity, the best foundation of national strength, thus animates a free people; and men of all conditions vie with each other in marks of inviolable attachment to their sovereign, and in a common concern for the public prosperity and welfare, what may we not hope in so just and righteous a cause?

“Let it be our endeavour, as it is our duty, to make a right use of the blessings we enjoy; and, by an uniform obedience to God’s laws, and by the practice of universal righteousness, so essential to the happiness of *any country*, to engage still farther the peculiar protection of Heaven.—Let us exert those powers which God has given us, as our respective situations shall enable us, to *his honor*, and the *common* benefit of our fellow-creatures; renouncing any vain confidence in our own arms, or in our own wisdom; and receiving any unmerited success from the hand of God with the devout spirit and acknowledgement of the Psalmist, *Not unto us, O Lord, not unto us, but unto thy name give the glory, for thy mercy and for thy truth’s sake*.*”

* Pf. cxv. 1.

“Die

“ *Die Lunæ, 3^o Decembris, 1759.* ”

Ordered,

By the Lords Spiritual and Temporal, in Parliament assembled, that the Thanks of this House be, and are hereby, given to the Lord Bishop of *Worcester*, for the Sermon by him preached before this House on *Thursday* last, in the Abbey-Church, *Westminster*; and he is hereby desired to cause the same to be forthwith printed and published.

Ashley Cowper, Cler. Parliamentor.”

CORRIGENDA.

Page. Line.

- x, 26. Preface. *for* advise, *read* advice.
- 39, 4. *for* transaction, *read* transactions.
- 51, 22. *for* first-fruits, *read* first-fruit.
- 89, 8. *for* our, *read* your.
- 126, 1. } *for* reversed, *read* reserved.
- 486, 32. }
- 184, 31. *for* officers, *read* offices.
- 186, 16. *for* sheriff, *read* sheriff's.
- 201, 8. *dele* us.
- 203, 16. *for* by opinion, *read* my opinion.
- 207, 12. *for* noble, *read* noble.
- 277, 20. *dele* for the 30th of January; *and for* Political, *read* Thanksgiving.
- 282, 1. *for* Laudi——nostræ, *read* Laribus——nostris.
- 324, Note. l. 4. *for* endeavour, *read* endeavour.
- 364, 6. *for* roken, *read* broken.
- 399, 14. *for* diapprobation, *read* disapprobation.
- 400, 18. *for* tenninus, *read* terminus.
- 444, 31. *for* be, *read* been.
- 448, 11. *for* 501, *read* 591.
- 456, 17 & 18, *after* succeeded, *read* the success is owing to two great objects.
- 487, 13. *for* Pendect, *read* Pandect.

INDEX RERUM.

- ADDINGTON, Doctor, anecdote of him and the bishop of Durham, Page 184
- ADMIRALTY, reference to the nature of prize jurisdiction there, 448
 ——— The purity of the high court of admiralty vindicated, 441
- AFFIRMATION of a Quaker, the nature of it, 173
- AMBASSADOR. Account of the arrest of the Russian ambassador, and the final settlement thereof, 34
- AMBASSADORS. Protections granted by them, and the nature of their privilege defined, 33
- AMERICA. Lord Mansfield's speech in Dom. Proc. on American taxation, revised and corrected by himself, 243
- ANECDOTES and character of lord Mansfield in his judicial capacity, 120, 127, 128, 129, 213, 465
- ANECDOTES, in private life, shewing his knowledge of men and things, 129, 130, 131, 184—187, 466, 470
- APPEAL of death, two instances thereof referred to, 319
- ARGUMENT, second, or farther argument, when to be granted, 193, 294
 ——— when to be refused, 114
- ARGUMENTS of convenience and inconvenience, how far they are to be attended to in judicial determinations, 211
- ASTON, Justice, summary account of, and reference to, his speech on literary property, 221
- ATTAINT. The writ of attain is refused, and a mere found, 116
- AUCTIONEERS, how far to be protected. Bexwell *versus* Christie, with lord Kenyon's reference to this case in a late determination, 396
- BAILIFF

B.

BAILIFF, in execution of mesne process, may break open the door of a lodger's apartments, having first gained peaceable entrance at the outer door of the house, 359

BANKRUPT Laws. The most desirable object in all judicial determinations *especially* in mercantile affairs is to do substantial justice. The statutes of bankruptcy leave a trader to the moment of an act of bankruptcy committed, every power an owner can have over his estate, 118

BATCHELOR. A subsequent marriage and having issue will amount to a revocation of a will of lands made by a batchelor, 290

BARON and Feme. See Husband and Wife.

BLACKETT, Sir Walter, anecdote of him, 130

BLACKSTONE, Mr. disappointed in his hope of succeeding to the civil-law-professorship at Oxford, but this disappointment led to the future establishment of a Vinerian professorship, 89

His Commentaries recommended by lord Mansfield, 90

BOOKS. See Literary Property.

BOOTH, James, esquire, letter from Mr. Murray to him in 1735, 32

BRIBERY at elections, punishable at common law as well as by statute, 134

BURRELL, Lady, her verses on lord Mansfield when at Tunbridge, 453

BUST of lord Mansfield by Nollekens, in Trinity Hall, Cambridge, 284

C.

CAMBRIDGE - UNIVERSITY.

Claim of a Southwell fellowship discussed and determined, 112, 113
The king

against Agar and O'Meara. Co-NUZANCE claimed and refused, 346

CAMDEN, Earl, his observations on lord Mansfield's justification in the cause of the king against Woodfall, 317

CASES reserved for opinion of court of King's Bench. Lord Mansfield's great care to prevent injury to the suitors, and to avoid delay, 125

out of Chancery, lord Mansfield's alteration of the mode of certifying, 293

CERTIFICATES of the Court of King's Bench on cases from the Court of Chancery, 111, 288, 290, 292, 295

CHANCERY, Court of, Cases sent from thence to the King's Bench, 285 to 296
CHES.

- CHESTERFIELD, Earl of, his letter on treaties existing between Great Britain and neutral states, 440
- CLAIM of office of high-steward by two noblemen referred to, 145
- CLERGY. Non-residence considered in two distinct cases, 320, 321
- COKE, Lord Viscount, conclusion of his speech in favor of Mr. Fraser on the trial of Lord Lovat, 68
- LORD COKE's loss of health, and early death deplored, 81
- COMMERCE protected and promoted, 148, 149, 186, 188
- MR. MURRAY's early attention to the interests of commerce, 122
-
- also to the argument of *pulcrum et honestum*, 35, 147
- THE CONSTITUTION does not allow reasons of state to influence the judgement of the judges, 164
- COPYHOLDS. Operation of surrender and admittance, 325
- COULSON AND COULSON. This case has been so long considered as law, that it should be submitted to, considered by some as a ruling authority, by others as a case not now to be litigated, 196, 200
- COURT. Jurisdiction of King's Bench as *custos morum* of the people, 214,
- COURT of Law may punish fraud and covin, 114
- CREDITORS when they may or may not be preferred previous to a bankruptcy, 189
- D.
- DAVY, Serjeant, his examination of a Jew to justify bail, 213
- DEBTS, Mutual, considered as a lien on goods for satisfaction of debt, 343,
-
- when one may or may not be set off against the other, 344
- DEED. What shall amount to a re-delivery of one, by a feme covert who joined with her husband without a fine in a mortgage, and did certain acts of confirmation after his death, 377
- DENNISON, Justice, his epitaph made by Lord Mansfield 275
- DEVISE. What words give a fee-simple, 293, 388
-
- An estate-tail, 133, 191, 288, 421
-
- An estate for life, 197
- Enlarged to an estate-tail, 198
-
- in fee to A and his child or children for ever when he attains twenty-one; but if he die before that time then to B in fee, this narrowed the first devise to an estate-tail, as if the testator had said, if A die without heirs of his body, 296
- DE-

DEVISE to A for a term of ninety years, if he shall so long live; and after the determination of that estate, then to the heirs of his body, remainder to B in tail, as the contingency must happen within the compass of a life in being, this is good as an executory devise, 286

——— Executory. A devise to B after one to the heir male of the body of A from and after the decease of A and limited on default of such issue, is a good executory devise, 418

DISSENTERS not liable to serve the office of sheriff in the City of London, 251

PROTESTANT Dissenters to be protected in their religious worship, 264

DIVORCE Bill. Lord Mansfield's manner of obviating objections to the recognition of a peerage in one of them, 404

DOUGLAS Cause in the House of Lords. Lord Mansfield's speech thereon, 264

DRURY and Drury. A decree of the Court of Chancery in this cause having been reversed. Anecdote thereon, 185

E.

ECCLESIASTICAL Court has jurisdiction, as *custos morum* of the peo-

ple in some cases appropriated to, and peculiarly within it, 214

ENTRY. Actual entry is necessary to avoid a fine, 420

ERROR. Writ of Error, what it is, 153

ERASMUS. Illustrations from his life by Dr. Jortin, 203, 206, 208

ESCHEAT. The crown is intituled to *Personal Estate*, by Escheat, where there is not any next of kin, 417

ESTATE for life or estate-tail. *Vexata questio*, Robinson and Robinson. In this case an estate-tail by implication was raised in support of the intention of the testator, 190

EXECUTORY Devise. There cannot be an executory devise after an indefinite failure of issue, 290, 420

EXCEPTIONS. Bill of Exceptions, the nature of it, 139

EVIDENCE Defined. In all cases lord Mansfield leaned to the admissibility of evidence, 123

F.

FAWCETT, Christopher, esquire, a provincial counsel, occasions an enquiry into the juvenile conduct of Murray, Johnson, and Stone, which is detailed by lord Melcombe in his diary, and recorded by other means, 98 to 104

FAW-

FAWCETT, Mr. his letter in exculpation of doctor Johnson, then bishop of Gloucester 103

FEARNE, Charles, esq. his strictures on lord Mansfield's determination in Perrin and Blake,

198 to 204

FOLEY, lord, Mr. Murray's grateful attention to him, 131

FOTHERGILL, doctor. The disputes with the College of Physicians revived in his case, 340

FRASER, General. The interposition of lord Coke and of Mr. Murray in his behalf, together with his own good conduct in America, laid the foundation of parliamentary restitution of part of the forfeited estates, 79 to 81

FRAUD and Covin, punishable at law, 114

G.

GARRICK David, appealed to by lord Mansfield, 211

GENERAL WARRANTS fully discussed, which, as they could not be defended on the principles of common law, were deemed indefensible and sunk into desuetude,

136 to 142

GREAT SEAL offered to lord Mansfield repeatedly and refused,

322—465

GOVERNORS of Plantations, &c. how far they are privileged, and

to be protected, 364 to 377

——— lord Mansfield's advice to one of them in making his decrees, 185

H.

HUSBAND and WIFE. Mortgage made by both of them of the wife's estate without a fine. What acts of hers, when a *feme sole* shall amount to a confirmation of the deed, 377

I. J.

IMPRISONMENT lies in England by a native *Minorquin* against a Governor of *Minorca*, for injury committed by him in *Minorca*, 365

INDICTMENT. Trivial flaw therein allowed in a writ of error, 168

INFORMER. Public informer ought not to be an evidence in a case wherein he is to gain a penalty on conviction, 177

INSURANCE. Reference to lord Mansfield's distinctions between a total and an average loss, 126

INTENTION of the testator to be supported whenever it may be done consistently with the rules of law, 421

JOHNSON, bishop of Gloucester. His manner of defending himself before the Cabinet Council against

T t t

Faw.

Fawcett's accusation of Murray, Johnson, and Stone, 103
 JOHNSON, bishop of Worcester, having been translated to that see (a few days previous to a general thanksgiving), and having been appointed by the lords to preach the sermon on that occasion in the abbey-church at Westminster; Lord Mansfield, as has been asserted from unquestionable authority, in a very friendly manner dictated the heads of the sermon printed in page 490, &c. of the Addenda.

JUDGES. A great judge is most open to conviction, 296—420
 ——— will despise threats, 165—166

JUDGEMENT reversed in aid of intention of testator, 420
 ——— of King's Bench only once reversed between 1756 and 1771, 228

JUSTICE of the Peace. Lord Mansfield's advice to him how to act with due caution, 186

K.

KENYON, Lord Chief Justice. His illustration of a case determined by lord Mansfield relating to sales by auction, Bexwell against Christie, 398

KING'S BENCH the Court of, is the *Custos Morum* of the people, 214
 KING'S BENCH PRISON. Application of the prisoners to the Court for a legacy, 127

L.

LAW. Reason is the first ground of all laws, 122
 ——— Why the Common is superior to Statute Law, 123
 ——— Distinction between Civil and Criminal Law, 174
 ——— Courts of law may relieve against fraud and imposition, as well as a court of equity, 114
 ——— MARITIME, discussed, and proved to be the general law of all nations, 124

LAW of NATIONS, eminent writers thereon, 34
 ——— in its full extent is part of the law of England, 33

LAW STUDENTS, lord Mansfield's great attention to their interest, 349, 380

LEASE, power to grant one in possession shall be good, although made to commence *from* the day of the date, which is inclusive or exclusive of the day according to the subject-matter, 399

LIBEL. The doctrine discussed. The King *versus* Almon, 307—310. Also in the King *versus* Woodfall, 311—318

LIBEL.

LIBEL. The difference between civil and criminal prosecutions in cases of libels, &c. 174, 297

LICENTIATES. Right of admission into the College of Physicians fully discussed in the case of Dr. Letch, 330—340; and in the case of Dr. Fothergill, 340—343

LIMITATION. Words of Limitation in a will may, in aid of the intent, be deemed words of purchase, 133

LITERARY Property. The discussion of the right in Miller and Taylor, in the Court of King's Bench, 215—241
again, in Donaldson and Donaldson, in Chancery, and the House of Lords.—Reference thereto, 241

M.

MADAN, the Rev. Mr. Anecdotes of him, wherein lord Mansfield is introduced, 186

MANDAMUS. The nature of the Writ defined, 263

MANSFIELD, lord, his great attention to the improvement of commerce exemplified;

1. In an action of debt for a penalty under the act of 5 Elizabeth, Chap. 4. Sect. 31.; against a person exercising the trade of a brewer without having served an apprenticeship, 110

2. In his speech in the House of

Lords to take away privilege 305
3. In enforcing great regularity in mercantile transactions,

147—186

MANSFIELD, lord, his speech on Mr. Wilkes's outlawry, 150—169

———— his observations on public threats, and on a deluded populace, 164

———— his speech on Literary Property in the King's Bench, 228

———— his speech on American taxation, corrected by himself, (in answer to lord Camden,) 242

———— his speech in the Douglas cause in the House of Lords, 264

———— his speech on lord Chatham's bill for reversing the adjudications of the House of Commons respecting Mr. Wilkes's incapacity of being elected a member to serve in the then present parliament,

271

———— his alteration of the mode of certifying cases sent from the court of Chancery to the Court of King's Bench, 293

———— his charge to the jury in lord Sandwich's prosecution of the printer of London Evening Post for *scandalum magnatum*, 297

———— his speech on lord Chatham's moving an amendment to the address of thanks to the king for his speech. This amendment

T t t 2

ment

- ment touched on the discontents which then prevailed, and particularly respecting the incapacity of Mr. Wilkes to be elected a member to serve in that parliament, 298
- This subject being resumed by a motion of lord Chatham's, called up lord Mansfield again, 302
- MANSFIELD, lord his speech on a bill for taking away all privilege from a lord's effects and from his servants, 303—307
- his observations on the speeches of the puisne judges in the case of Literary Property, and his own sentiments thereon, 228—241
- his speech in the House of Lords on American taxation, revised by himself, 242
- his speech on the Dissenters Bill, and act of toleration, revised and approved of by his lordship, 252—262
- Dissenters not liable to serve the office of sheriff in the City of London, 256
- By analogy, the Writ of Mandamus, since the Toleration-act, ought to protect the pastor of Protestant Dissenters, 263
- His own account of the opportunities he had of preparing legal arguments, 274
- MANSFIELD, lord, his charge to the jury on an information filed against a printer for re-publishing Junius's Letter to the King, 311
- His speeches in the long litigated disputes between the College of Physicians, and the licentiates, 331—340
- His speech in the cause of Morgan and Jones sent by way of case from the Court of Chancery, and terminated in the House of Lords, 349
- His sedulous care to prevent a delay of justice, 113—118
- To promote substantial justice, by altering his opinion in consequence of fuller investigation of abstruse points, 293, 420
- appointed chancellor of the Exchequer *pro tempore*, and the salutary effects thereof, 111
- His moral character considered, 121, 145, 464
- His private character and familiar anecdotes, 129, 147, 184
- His thoughts on solitary confinement, 145
- Refused the great seal repeatedly, 322
- His animated speech on Mr. Wilkes's outlawry, 150—169
- His great respect for settled rules, 211
- His reception at Tunbridge,

- bridge, in 1784, where he went for the recovery of his health, 451
- MANSFIELD, lord, his character by modern writers of eminence 457—461
- His unstudied observations on the French Revolution, 466
- Reference to the will and codicils of lord Mansfield, 467
- Summary revision of his character, 472
- His last illness and death 479
- Mr. Baillie, in return for eminent services, leaves a considerable sum by his will for a monument to the memory of lord Mansfield, and a farther sum for the best monumental inscription, 480
- MARRIAGE, promise thereof, and the effect of bonds in restraint of marriage considered, 180
- MARRIOTT, Sir James, employed artists in making a bust and miniature-pictures of lord Mansfield, 284
- MARITIME LAW considered, not as the law of any particular country, but as the *jus gentium*, 124
- MILLER and Taylor, respecting Literary Property. The first case of a final difference of opinion of the judges of King's Bench, 228
- MELCOMBE, Lord, his diary of the proceedings against Murray, Johnson, and Stone, 98
- MINORS. What acts they may do, and how far they are to be protected against acts done by them, 380
- MORGAN and Jones. Lord Mansfield's state of the case and speech therein, 349
- MURRAY, the Honorable William, was one of the eleven children of David Viscount Stormont, 1
- was educated at Westminster-school, and distinguished himself there by his declamations and Latin verses, 3
- Lord Monboddo. His examen of Mr. Murray's Oration in praise of Demosthenes, 8
- In 1730, Mr. Murray took his degree of M. A. and soon afterwards went abroad 11
- Letter from Mr. Murray to the late duke of Portland on the study of Ancient History, 12—17
- Another Letter on the study of Modern History, 17—23
- The numerous references to authors in these letters revised and corrected, 23
- In Michaelmas term, 1730, Mr. Murray was called to the bar, 24

MUR-

MURRAY, Mr. studied elocution
under the auspices and aid of Mr.
Pope, 24

———— On the recommendation
of Mr. Murray, a Latin version of
Pope's Essay on Man is proposed to
be made by Mr. Smart of Pem-
broke-college, Cambridge, 25

———— Verses by Mr. Pope in
praise of Mr. Murray, 26, 7, 8

———— Mr. Murray in the years
1732, 3, 4, is engaged in many
appeals in Dom. Proc. 28—31

———— In 1736, the great ques-
tion on the Law of Nations, re-
specting the privilege of foreign
ministers, and the protection of
their domestic servants, was ar-
gued by Mr. Murray, before Lord
Chancellor Talbot, 33

———— In 1737, Mr. Murray
the junior counsel for Mr. Sloper,
in an action for damages brought
against him by Theophilus Cibber,
is, on account of the sudden indis-
position of the senior counsel, cal-
led upon to go on with the cause,
35

———— The consequences flow-
ing from his success on the last-
mentioned cause, 36

———— Similar incidents ad-
duced in other great legal charac-
ters by way of illustration, 36, 7

———— In 1737 Mr. Murray
was counsel for the city of Edin-

burgh, and received the freedom
of that city in a gold box. Verses
on that occasion made by a youth
of fourteen, 39

MURRAY. In 1738 Mr. Murray
married lady Elizabeth Finch, who
died the 10th of April, 1784, 40

———— The appeals in Dom.
Proc. in the year 1738, did not
exceed sixteen, and in *eleven* of
those Mr. Murray was employed as
counsel either for the appellants or
respondents, 40

———— History of one of those
appeals, wherein Mr. Murray was
counsel for an Irish widow, who
had sustained many years expensive
litigation for recovery of her
dower, 41

———— Brief examination of
some great outlines of the charac-
ter of Mr. Pitt (first earl of Chat-
ham), also of Mr. Murray (first
earl of Mansfield), and of their
great powers in oratory, 44—53

———— Mr. Murray's speech in
parliament, in 1743, in defence of
the prerogative of the crown, 56

———— In 1746, Mr. Murray
when he was solicitor general in the
trials of the rebel-lords, gains the
applause of law-lords; of his co-
adjutor the attorney general, and
of lord Lovat the prisoner, 65, 74,
78

MUR-

MURRAY. Lord Coke, and Mr. Murray humanely and forcibly speak in extenuation of Mr. Frazer's supposed crime, the son of lord Lovat, 68—72

———— Mr. Murray's speech in answer to an honourable member's arguments in opposition to the address of thanks to the king for his speech, 82

———— The Professorship of civil law at Oxford being vacant, Mr. Murray recommended Mr. Blackstone to the first duke of Newcastle. The disappointment which Mr. Blackstone experienced on this occasion led (under the auspices of Mr. Murray) to future fortune, and gave rise to the Vine-rian professorship, 89

———— Mr. Murray's early attention to the commercial interests of this kingdom, 90

———— Mr. Murray, his majesty's solicitor general, doctor Johnson, bishop of Gloucester, and Andrew Stone, esquire, preceptor to the then Prince of Wales, were, in 1751, accused of having, when they were at Westminster-school, drunk disloyal healths. A solemn investigation took place in 1753, which terminated, as an accusation of that kind might be expected to end, by establishing those characters which were attempted to be aspersed, 98—104.

MURRAY. Farther illustration of the defence made by bishop Johnson, Mr. Murray, and Mr. Stone, against the accusation introduced by lord Ravensworth, in 1753, 484

———— In 1754, on the promotion of Sir Dudley Ryder, the King's attorney general, to the high office of Chief Justice, Mr. Murray was made attorney general. And on the death of Lord Chief Justice Ryder, in 1756, the King's attorney general was appointed chief justice of the King's Bench, 104

———— Previous to his taking his seat as lord chief justice, he took leave of the Honorable Society of Lincoln's Inn, was addressed by the honorable Charles Yorke in a complimentary speech, to which Mr. Murray made an eloquent reply, 105

———— Mr. Murray, on his being appointed chief justice of the court of King's Bench, was made a peer of the realm, under the style and title of baron of Mansfield, in the county of Nottingham, 109

———— Was appointed Chancellor of the Exchequer *pro tempore*; and principally through his mediation a coalition was brought about, which gave energy to the war, and was of infinite service to the kingdom. 111

MUR-

MURRAY. The rescript and report of the great law-officers annexed to the duke of Newcastle's letter, by his majesty's order, to the king of Prussia's secretary of the embassy, in answer to the memorial and other papers delivered by Monsieur Michell to the duke of Newcastle, in 1752, 428—447
 The fact is well authenticated, that the report signed by sir George Lee, by Dr. Paul, and by the attorney and solicitor general, was drawn up by, and the sole composition of, Mr. Murray, 424
 ——— Mutiny-act not drawn with critical nicety, and to be liberally construed, 129

N.

NEWTON, Bishop of Bristol, his account of Mr. Murray at Westminster-school, 3
 ——— His observations on lord Mansfield's speech in opposition to lord Chatham's bill relating to Mr. Wilkes's election, 274
 ——— His letters to, and character of, lord Mansfield, 449, 459

O.

OUTLAWRY fully discussed in 1768 in Mr. Wilkes's case, 150—169

OXFORD UNIVERSITY. The origin of the Vinerian Professorship there, 89

P.

PAPISTS. On the trial of Mr. James Webb, at the suit of Payne, lord Mansfield manifested his sense of toleration in matters of religion, 176

PARKER, Lord chief baron, his love of abiding by former decisions, 207; and anecdotes of him, 403, 463

PEERAGE, not to be recognized in a bill in parliament before the claimant has established his claim, 404

PERRIN and Blake, true state of it and the conclusion, 190—209

PHYSICIANS, College of, their disputes with the licentiates discussed in the case of Dr. Letch, 330; and in Dr. Fothergill's case 340

POPE, Alexander, esquire, anecdotes of him, 24—28, 285

PORTRAITS of lord Mansfield by eminent painters, the first by Vanloo, and the last by sir Joshua Reynolds, 281—284; and a bust by Nollekens, 284

PRACTICE. Matters of practice not to be learned from books, 169

——— Lord Mansfield on a point of practice in pleading, 170

PUR-

PURCHASER, who must take as such, and the necessary description, 133

Q.

QUAKERS' affirmation to be received in action of debt on statute against bribery, 170

R.

REFERENCE to a digest of cases and determinations pending lord Mansfield's chief-justice-ship, 483

REMAINDERS. Cross remainders when they arise, 294

REVOCATION. What shall amount to a revocation of a will, 212, 290
— shall not make void a former charge made by tenant for life, 422

RICHMOND, Duke of, a reason assigned for his grace's great attention to a legal question, Whether the devise in a will was of an estate for life, &c. 207

RIOT in Edinburgh in 1736, discussed in parliament, 37

RIOTS. Lord Mansfield's conduct in 1780. Detail of incidents wherein lord Mansfield was personally interested, 408

RULES, General, the utility of them considered, 123

RULES and principles of equity, on what occasions they have been adopted by lord Mansfield in a court of law. See dispute respecting the right to a Southwell fellowship, 112

S.

SEAMEN. Power of impressing founded on immemorial usage. Protections to some may have the same foundation, 392

SCANDALUM MAGNATUM.

Lord Mansfield's charge to the jury in lord Sandwich's prosecution of the printer of the London Evening Post, 297

SETTLEMENT, one by deed, in consideration of love and affection to his name, blood, &c. and for settling the undivided moieties of his manors, lands, &c. therein after mentioned, grants the said undivided moieties, particularly describing them, together with all all other his lands, tenements, and hereditaments in the kingdom of Ireland—*Habendum* the said undivided moieties before granted, together with all other his estate in the kingdom of Ireland to A, to the

U u u

several

several uses therein declared, and for no other use whatsoever, and then declares the use of the undivided moieties only. Held, that the grantor did not intend to pass any lands but the undivided moieties. Secondly, supposing the sweeping clause did extend to any other lands, yet, no use being declared of them, they descend to the heir at law, 295

STUDENTS, cases to be stated by the counsel for their benefit, 349, 380

SUMMONS. Nature of a judge's summons, 170

SURRENDER of copyholds, how it operates, 325

T.

TOLERATION. The principles of it discussed by lord Mansfield. See Quakers' testimony, and Papists, and Dissenters, 170—174

TREVOR, bishop of Durham. Anecdote of him, 184

TRIALS. Rules for new trials discharged, 129, 307, 324, 330
——— New Trials granted, and for what end granted, 110, 116, 117, 118

TRUSTS. The Law of Trusts considered, and defined by lord Mansfield, 193, 209

U.

UNANIMITY of Decision, how best promoted, 228

UNIVERSITIES of Oxford and Cambridge. College-Statutes and ingrafted Fellowships considered, in the claim of a Southwell Fellowship, 112

also in the claim of office of High Steward of Cambridge by two noblemen, 145

USAGE. Legal usage what constitutes it, 141

W.

WAGER. Action lies to recover money won upon a wager, unless the motive be fraud or other *turpis causa*, 323

WARBURTON, Bishop of Gloucester, his dedication of his Divine Legation to lord Mansfield, 142

————— Wherein he assimilates the character of the latter to that of the great ERASMUS, 144

WILKES, Mr. a candidate for Middlesex. Proceedings thereon, 149

WILLES, Justice. Reference to his speech on Literary Property, 220

WILL. The credibility of witnesses to a will considered, 120

WILL.

WILL. In a Will, words of limitation may, under certain circumstances, and in aid of the intention, be construed as words of purchase, 132

—— Reference to the will and codicils of lord Mansfield, 467

WOODFALL. The King against Woodfall, Lord Mansfield's justification in the House of Lords of his conduct in this cause, 313

WORCESTER, Bishop of, his character of Lord Mansfield, 460

WRECK of the sea. What kind of loss falls under that denomination, 327

Y.

YATES, Sir Joseph, his manner of diversifying his studies, 126

—— Reference to his speech on Literary Property, 224

—— His answer to Mr. Justice Blackstone's observation thereon, 225

YORK, archbishop of, his resistance of the rioters in 1780, 410

F I N I S.

DIRECTIONS to the BINDER.

The First Print, of Mr. MURRAY, to face p. iii.

The Second, of Lord MANSFIELD, to face p. 279.

Will, in a Will, words of	132
them may, under certain circum-	
stances, and in aid of the inter-	
tion, be construed as words of pur-	
chase	132
Reference to the will and co-	
dicts of Lord Mansfield	132
WOODHILL, The King against	
Woodhill, Lord Mansfield's judi-	
cation in the House of Lords of his	
conduct in this cause	313
WORCESTER, Bishop of, his cha-	
racter of Lord Mansfield	460
WRECK of the sea. What kind of	
loss falls under that denomination,	
	327
YATES, Sir Joseph, his manner of	
divesting his lands	130
Reference to his speech in	
Parliament	327
Yates's Property	
His answer to Mr. Justice	
Blackstone's objection thereon	
	327
YORK, Archbishop of, his residence	
of the rectors in 1780	419

Directions to the Reader.

The First Part, of Mr. Murray, to face p. iii.

The Second, of Lord Mansfield, to face p. 279.

Holliday, John

The life of William late Earl of Mansfield

London 1797

4 Biogr. 162 r

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